No. 00-1937-CFX Title: Jo Anne B. Barnhart, Commissioner of Social Security, Petitioner
v.
Cleveland B. Walton

Docketed:
June 28, 2001 Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	May 18 2001	Application (00A1013) to extend the time to file a petition for a writ of certiorari from May 28, 2001 to July 27, 2001, submitted to The Chief Justice.
	May 21 2001	Application (00A1013) granted by the Chief Justice extending the time to file until June 27, 2001.
	Jun 15 2001	Application (00A1013) to extend further the time to file a petition for a writ of certiorari from June 27, 2001 to July 12, 2001, submitted to The Chief Justice.
	Jun 18 2001	Application (00A1013) denied by the Chief Justice.
	Jun 27 2001	Petition for writ of certiorari filed. (Response due July 28, 2001)
	Jul 9 2001	Brief of respondent in opposition filed.
	Jul 9 2001	Motion of respondent for leave to proceed in forma pauperis filed.
	Jul 25 2001	DISTRIBUTED for Conference of September 24, 2001
	Jul 27 2001	Reply brief of petitioner Larry G. Massanari, Acting Commissioner of Social Security filed.
	Sep 25 2001	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Sep 25 2001	Petition GRANTED. SET FOR ARGUMENT January 16, 2002. **********
	Nov 9 2001	Order extending time for filing the joint appendix and petitioner's request for an extension of time to and including November 21, 2001.
	Nov 21 2001	Joint appendix filed (TBP).
	Nov 21 2001	Brief of petitioner JoAnne Barnhart, Commissioner of Social Security filed.
	Nov 29 2001	Record filed.
	Nov 29 2001	Record filed.
	Dec 3 2001	CIRCULATED.
	Dec 4 2001	LODGING consisting of twenty copies of related material submitted by the Solicitor General and distributed.
	Dec 12 2001	Brief of respondent Cleveland B. Walton filed.
	Dec 21 2001	Brief amici curiae of AARP, et al. filed.
	Jan 9 2002	Reply brief of petitioner Jo Anne B. Barnhart, Commissioner of Social Security filed.
	Jan 16 2002	ARGUED.

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No. 001937 JUN 27 2001

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In the Supreme Court of the United States

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CLEVELAND B. WALTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title II and Title XVI of the Social Security Act define disability as the "inability to engage in any substantial gainful activity by reason of any * * * impairment which can be expected to result in death or which has lasted or can be expected to last for * * * not less than 12 months." 42 U.S.C. 423(d)(1)(A); 42 U.S.C. 1382c(a)(3)(A) (1994 & Supp. IV 1998). Under Title II, once a claimant is entitled to disability insurance benefits, the claimant may engage in substantial gainful activity during a "trial work period" of up to nine (not necessarily consecutive) months without being disqualified from receiving benefits. 42 U.S.C. 422(c). The questions presented are:

1. Whether a claimant is entitled to disability benefits under Titles II and XVI of the Social Security Act if he has a physical or mental impairment that has lasted or can be expected to last at least 12 months, but his inability to engage in substantial gainful activity by reason of that impairment has not lasted or cannot be expected to last 12 months.

2. Whether a claimant under Title II may be under a disability and entitled to a "trial work period" if, at the time his disability insurance benefits claim is adjudicated, his impairment no longer prevents him from performing substantial gainful activity.

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In the Supreme Court of the United States

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CLEVELAND B. WALTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Acting Commissioner of Social Security, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 235 F.3d 184. The opinion and judgment of the district court (App., *infra*, 15a-26a, 27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2000. A petition for rehearing was denied on February 27, 2001 (App., *infra*, 62a). On May 21, 2001, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and

including June 27, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Social Security Act, 42 U.S.C. 301 *et seq.*, and the relevant regulations, 20 C.F.R. Pts. 404 and 416, are set forth in the appendix to the petition, App., *infra*, 63a-104a.

STATEMENT

This case concerns the meaning of a fundamental term—"disability"—under the disability insurance program established by Title II of the Social Security Act (Act) and the Supplemental Security Income program established by Title XVI of that Act.

1. a. Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, which was first enacted in 1935, provides old-age, survivor, and disability benefits for insured individuals. Congress added the disability insurance benefits provisions to Title II in 1956. Social Security Amendments of 1956, Pub. L. No. 880, Tit. I, § 103, 70 Stat. 815. As originally enacted, the disability insurance program provided for the payment of monthly benefits to anyone who was unable to "engage in any substantial gainful activity by reason of" an "impairment which can be expected to result in death or to be of long-continued and indefinite duration." 42 U.S.C. 423(c)(2) (1958); S. Rep. No. 404, 89th Cong., 1st Sess. 98-99 (1965).

The requirement that the disability be of "long-continued and indefinite duration" proved difficult to administer and, in 1965, Congress amended the Act to make the duration requirement more certain. See Social Security Amendments of 1965, Pub. L. No. 89-97, Tit. III, § 303(a)(1), 79 Stat. 366. In the previous decade, a disability that lasted 12 months was found in

the "great majority" of cases to be of "long-continued and indefinite duration" within the meaning of the Act and thus sufficient to entitle the claimant to benefits. S. Rep. No. 404, *supra*, at 99. A 12-month disability requirement, Congress concluded, would generally prevent the program, which was directed at long-term disabilities, from being required to pay "disability benefits in cases of short-term, temporary disability." *Id.* at 98. Accordingly, the Social Security Amendments of 1965 replaced the "long-continued and indefinite duration" requirement with a 12-month disability requirement. 79 Stat. 366. Title II of the Social Security Act thus now provides:

> The term "disability" means—inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. 423(d)(1)(A).

Title II further provides that an individual "shall be determined to be under a disability *only if* his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A) (emphasis added); see *Bowen* v. *Yuckert*, 482 U.S. 137, 147-148 (1987). That section was added by the Social Security Amendments of 1967 in response to a decision of the Fourth Circuit, *Leftwich* v. *Gardner*, 377 F.2d 287 (1967), which had held that a claimant was under a disability despite his performance of work at a level that, according to the Secretary of

Health, Education and Welfare, demonstrated the claimant's ability to engage in substantial gainful activity. See H.R. Rep. No. 544, 90th Cong., 1st Sess. 29, 31 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 46-50, 263-264 (1967). The 1967 amendments also added a provision directing that the Commissioner "shall by regulations prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity," and providing as a general rule that "an individual whose services or earnings meet such criteria shall * * * be found not to be disabled." 42 U.S.C. 423(d)(4)(A); see note 1, *infra*.

To encourage individuals to return to work, the Title II disability insurance benefit program also provides for a "trial work period" during which individuals may engage in what would otherwise be considered "substantial gainful activity" without losing disability benefits. 42 U.S.C. 422(c). The "period of trial work" begins "with the month in which [the claimant] becomes entitled to disability insurance benefits," 42 U.S.C. 422(c)(3), and ends after the individual has performed services for nine months (which need not be consecutive), or the month in which the disability actually ceases, if that is earlier, 42 U.S.C. 422(c)(4)(A) and (B). "[A]ny services rendered by an individual during a period of trial work" are "deemed not to have been rendered by such individual in determining whether his disability has ceased in a month during such period." 42 U.S.C. 422(c)(2). Thus, under the trial work provisions, once an individual is entitled to benefits under the disability insurance program, he may work for up to nine months without losing benefits. See *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805 (1999).

b. Congress enacted Title XVI of the Social Security Act, 42 U.S.C. 1381 *et seq.*, in 1972 to provide Supplemental Security Income (SSI) to financially needy persons who are aged, blind, or disabled. See Pub. L. No. 92-603, Tit. III, § 301, 86 Stat. 1465. Unlike Title II, which is an insurance program, the SSI program established by Title XVI is a welfare program that looks to financial need. *Bowen* v. *Yuckert*, 482 U.S. at 140. Both programs, however, use the same definition of disability. The SSI program thus provides that a claimant is "disabled" for purposes of Title XVI if he is "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months," 42 U.S.C. 1382c(a)(3)(A) (1994 & Supp. IV 1998), and further provides that an individual "shall be determined to be under a disability only if" the impairment is "of such severity that" the individual cannot engage in any "substantial gainful work which exists in the national economy," 42 U.S.C. 1382c(a)(3)(B). Unlike Title II's disability insurance program, however, Title XVI's SSI program does not provide for a trial work period. See Employment Opportunities for Disabled Americans Act, Pub. L. No. 99-643, 100 Stat. 3574 (amending 42 U.S.C. 1382c to eliminate trial work period).[1]

c. For approximately three decades, the Commissioner of Social Security has interpreted the Social

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[1] Beginning July 1, 1987, under Section 1619 of the Social Security Act, 42 U.S.C. 1382h, a disabled SSI recipient who has earnings ordinarily considered to represent substantial gainful activity can still receive SSI payments so long as his income does not make him financially ineligible to receive SSI.

Security Act as precluding an award of disability benefits unless the claimant's inability to perform substantial gainful activity has lasted or can be expected to last for 12 consecutive months. See, *e.g.* Social Security Ruling (S.S.R.) 73-7 (Cum. Ed. 1971-1975); S.S.R. 82-52, at 328 (Cum. Ed. 1981-1985) ("In considering duration, it is the inability to engage in [substantial gainful activity] that must last the required 12-month period."). The Commissioner's five-step sequential evaluation process for adjudicating disability claims, established by regulation and considered by this Court on a number of occasions (see, *e.g.*, *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. at 804; *Bowen* v. *Yuckert*, 482 U.S. at 140-142), has long incorporated at the first step the requirement that the inability to engage in substantial gainful activity last for at least 12 months. See *Bowen* v. *Yuckert*, 482 U.S. at 140 (citing 20 C.F.R. 404.1520, 416.920 (1986)); S.S.R. 82-52, at 331 ("The denial determination or decision for insufficient duration should not be understood as independent of the sequential evaluation process."). The Commissioner's new final rules governing the determination of substantial gainful activity and the trial work period under Title II, issued last year, also incorporate that 12-month disability requirement. See Determining Disability and Blindness; Substantial Gainful Activity Guides, 65 Fed. Reg. 42,774 (2000) (final rules); see also Determining Disability and Blindness; Substantial Gainful Activity Guides, 60 Fed. Reg. 12,168 (1995) (notice of proposed rulemaking).

Thus, under the Commissioner's longstanding construction of the Act, it is not enough that an individual's underlying medical *impairment* has already lasted or can be expected to last for at least 12 months. 65 Fed. Reg. at 42,774, 42,780. Instead, the disability—the

inability to engage in substantial gainful activity by reason of the claimed impairment—must have lasted or be expected to last for at least 12 months. Consequently, a claimant who is able to work within one year of the onset of his inability to work is generally not considered disabled. As the Commissioner recently explained, it has been his "longstanding interpretation" of the Act that "the duration requirement to establish disability will not be met and a disability claim will be denied based on evidence that, within 12 months after the onset of an impairment which prevented substantial gainful activity and before [the agency] ha[s] issued any notice of determination or decision finding disability, the impairment no longer prevents substantial gainful activity." *Ibid.* See also 20 C.F.R. 404.1520(b) ("If you are working and the work you are doing is substantially gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience."); 20 C.F.R. 404.1520(f) ("*Your impairment(s) must prevent you from doing any other work.*"); 20 C.F.R. 404.1571 ("If you are able to engage in substantial gainful activity, we will find that you are not disabled.").

Disability determinations can also be made based on the *expected* duration of the disability. In particular, if the disability determination is made before the expiration of 12 months after the onset of the alleged inability to engage in substantial gainful activity, the claimant may be determined to be disabled if the inability to engage in substantial gainful activity is by reason of an impairment that "can be expected to last" 12 months. 42 U.S.C. 423(d)(1)(A). Thus, it is not necessary for the Commissioner to wait 12 months from the onset of the alleged disability to adjudicate a disability claim. Instead, so long as the inability to work "can be

expected" to last 12 months, the claimant may be determined to be disabled. See 65 Fed. Reg. at 42,774 ("We believe that Congress provided that disability can be found based on an impairment which 'can be expected to last' 12 months simply to provide a means for us to adjudicate disability claims without having to wait 12 months from onset."); S. Rep. No. 404, *supra*, at 99 ("[W]here disability has existed for 12 calendar months or more, no prognosis would be required. Where a worker has been under a disability which has lasted for less than 12 months, the bill would require only a prediction that the worker's disability will continue for a total of at least 12 calendar months after onset of the disability.").[2]

The Commissioner has also issued regulations governing entitlement to a trial work period for purposes of the disability insurance program under Title II. Under the Social Security Act and the Commissioner's regulations, an individual is not entitled to a trial work period unless the individual is "entitled to disability insurance benefits." 42 U.S.C. 422(c)(3) (trial work period begins when individual "becomes entitled to disability insurance benefits"); 65 Fed. Reg. at 42,787 (to be codified at 20 C.F.R. 404.1592(d)(1)(2001)) ("You are generally entitled to a trial work period if you are entitled to disability insurance benefits."). As explained above, the Commissioner has determined that entitlement to disability benefits is contingent on the

[2] Because that disability determination turns on a prediction that is sometimes wrong—*i.e.*, a claimant who the Commissioner expected would not be able to return to work within 12 months in fact may return to work during that period—there is a narrow class of individuals who are entitled to and receive disability benefits even though they were able to work within 12 months of the onset of their disability.

claimant being unable to engage in substantial gainful activity, or being expected to be unable to engage in such activity, for at least 12 months. Accordingly, an individual who has been unable to work for a full 12-month period is "entitled" to benefits and thus to a trial work period; similarly, an individual who is determined by the Commissioner to be *expected* to be unable to work for such a period is "entitled" to benefits and a trial work period. *Ibid.* But if the Commissioner does not find that the individual is expected to be unable to engage in substantial gainful activity for at least 12 months by reason of the impairment, and if the individual in fact returns to work within 12 months, the individual is not entitled to benefits and is not entitled to a trial work period. See 65 Fed. Reg. at 42,774 ("Because the person cannot become entitled to disability benefits in this situation, there can be no trial work period."). Accordingly, as the Commissioner's regulations explain, a claimant is not entitled to a trial work period if he "perform[s] work demonstrating the ability to engage in substantial gainful activity within 12 months of the onset of the impairment(s) that prevented [the claimant] from performing substantial gainful activity and before the date of any notice of determination or decision finding that [the claimant is] disabled." 65 Fed. Reg. at 42,787 (to be codified at 20 C.F.R. 404.1592(d)(2)(iii) (2001)).

2. On October 31, 1994, respondent Cleveland B. Walton was terminated as an in-school suspension teacher. After several work attempts, he was diagnosed in March 1995 as suffering from schizophrenia. In May of that year, respondent began working part-time as a cashier at a grocery store. By October 1995, he earned more than $500 a month, raising a presumption of substantial gainful activity under the regulations

issued by the Commissioner pursuant to 42 U.S.C. 423(d)(4) (A). See 20 C.F.R. 404.1574(b)(2).[3] Respondent began to work full time at the grocery store in December 1995, and he worked there successfully for two years before being suspended for selling alcohol to a minor. App., *infra*, 53a-54a; A.R. 440, 444.

In March 1995, respondent applied for disability insurance benefits under Title II and SSI benefits under Title XVI, citing his schizophrenia and related depression. In 1996, the Administrative Law Judge (ALJ) determined that respondent had not engaged in substantial gainful activity and otherwise satisfied the definition of disability for the period, which exceeded 12 months, between October 1994, when respondent was discharged by the school district, and December 1995, when respondent began to work full time at the grocery store. App., *infra*, 52a-61a. The Appeals Council of the Social Security Administration remanded the case to determine whether respondent had engaged in substantial gainful activity within one year of the alleged onset of his disability. Under S.S.R. 82-52, the Appeals Council noted, such activity before the lapse of the 12-month period following onset requires a denial of benefits. *Id.* at 47a-49a. On remand, the ALJ denied respondent's claim for benefits. *Id.* at 39a-46a. Like the Appeals Council, the ALJ noted that, under the Commissioner's construction of the Social Security Act set forth in S.S.R. 82-52, a claim must be denied when an individual returns to work within 12 months of the

[3] As discussed above, p. 4, *supra*, Section 423(d)(4)(A) directs the Commissioner to issue regulations for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity and thereby render him not disabled.

impairment's onset. See *id.* at 41a (The "duration requirement provides that [the claimant] must be prevented from performing substantial gainful activity for a 12-month period even if his impairment lasted or was expected to last for 12 months."). Reviewing the evidence and applying the regulatory criteria for determining whether work performed or earnings derived from such work demonstrate an ability to engage in substantial gainful activity, the ALJ concluded that respondent had engaged in substantial gainful employment as of October 1995, within one year of the onset of his impairment. App., *infra*, 41a-44a; see p. 4, *supra*. Accordingly, the ALJ held that respondent was not disabled and was not entitled to benefits. App., *infra*, 45a.

The ALJ also determined that respondent was not entitled to a trial work period. App., *infra*, 44a. Respondent "returned to substantial gainful activity beginning in October 1995," the ALJ explained, and thus could "not be found to be under a 'disability' because he was not prevented from working for any continuous period of 12 months." *Ibid.* Because respondent "is not under a 'disability,'" the ALJ further explained, "he is not entitled to a cash benefit or to a trial work period under the Regulations." *Ibid.*

3. Respondent sought review in district court. The magistrate judge recommended granting summary judgment in favor of the Commissioner, App., *infra*, 30a-35a, and the district court accepted that recommendation, *id.* at 15a-26a.

The magistrate and district court both concluded that a claimant's disability (*i.e.*, his inability to engage in substantial gainful activity) and not just his impairment must last at least 12 months. In this case, they observed, respondent had engaged in substantial gainful activity within 12 months of the date of onset. Accord-

ingly, the magistrate and district court held that respondent's claim failed at the first step of the sequential evaluation process, because respondent could not be found unable to engage in substantial gainful activity for the requisite 12-month period. See App., *infra*, 23a-24a, 33a-34a.

The magistrate and district court also rejected respondent's request for a trial work period. Because respondent was not entitled to disability benefits, they held, respondent was not entitled to a trial work period. App., *infra*, 17a n.2, 34a.

4. The court of appeals reversed. App., *infra*, 1a-14a. The court of appeals sustained the ALJ's conclusion that respondent engaged in substantial work activity in October 1995, less than 12 months after the onset of his alleged inability to work, *id.* at 2a n.1, 5a, but it rejected the Commissioner's interpretation of the Act's definition of disability, under which such activity rendered respondent ineligible for benefits, *id.* at 6a-10a. Applying the two-step test of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court rejected the Commissioner's interpretation under step one as contrary to the "clear and unambiguous" language of the statute. App., *infra*, 6a. The statute's text, in the court's view, plainly requires only that the *impairment* giving rise to the disability last, or be expected to last, more than a year; the inability to work itself, the court held, need not last that long. *Id.* at 7a. The court first observed that 42 U.S.C. 423(d)(1)(A) defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." App., *infra*, 7a. The court then found it dispositive that the phrase "which has lasted or can be expected to last for a continuous period of not less than 12 months" modifies "impairment," not "inability to engage in substantial gainful activity." *Id.* at 7a-8a. See also *id.* at 11a. Accordingly, the court concluded that "a claimant whose impairment was 'expected to result in death,' or which 'lasted' or 'was expected to last' for a continuous period of not less than twelve months may be disabled, even if the inability to engage in substantial gainful activity does not cause death or actually persist for twelve months." *Id.* at 8a.

Having invalidated the Commissioner's construction of the statute, the court of appeals then concluded that respondent is entitled to disability insurance benefits. In this case, the court explained, respondent's impairment was expected to last (and did last) more than 12 months. Moreover, at the expiration of the five-month waiting period after the onset of respondent's disability (*i.e.*, by April 1995), respondent had not returned to work.[4] Accordingly, the court concluded that respondent had met the statutory requirements for entitlement to an award of disability insurance benefits under Title II. App., *infra*, 9a. The court did not separately address respondent's claim for SSI benefits under Title XVI of the Social Security Act, which has no statutory waiting period.

The court of appeals also held that respondent was entitled to a trial work period. App., *infra*, 9a-10a. Respondent's entitlement to a trial work period, the court

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[4] Under 42 U.S.C. 423(a) and (c)(2), there is no entitlement to receive benefits until after the expiration of the earliest period of five consecutive months "throughout which" the individual is "under a disability."

stated, is "conclusively settled" in his favor by the court's earlier conclusion that respondent was entitled to disability benefits as of April 1995, when the five-month waiting period expired. *Id.* at 9a. The court noted that the period of trial work begins once the claimant becomes entitled to disability benefits. Having found that respondent was entitled to benefits beginning in April 1995, the court further concluded that respondent qualified for a nine-month trial work period as of that date. *Ibid.* Because the "trial work period precludes consideration of the October 1995 [work]," the court stated, respondent "meets even the Commissioner's extra-statutory requirements for a finding of disability"—*i.e.*, that the inability to work, like the underlying impairment, must have lasted or be expected to last at least 12 months—since no work "during the period of twelve months from his disability onset date, October 31, 1994, could have been considered." *Id.* at 10a.

The court also rejected the Commissioner's construction of the Social Security Act as unreasonable under the second step of *Chevron*. App., *infra*, 10a-13a. In so doing, however, the court mostly repeated its textual analysis of the Act. *Id.* at 10a-11a. In addition, the court rejected as unreasonable the Commissioner's position that the trial work period cannot begin until after either (a) benefits are granted or (b) the individual is unable to work for 12 consecutive months. The Commissioner, the court noted, had interpreted the phrase "can be expected to last" in the definition of disability as having been included "so that [the agency could] 'adjudicate disability claims without having to wait 12 months from the alleged onset of disability, rather than to permit claims to be allowed in the face of evidence that the claimant's impairment did not prevent sub-

stantial gainful activity for 12 continuous months.'" *Id.* at 12a (quoting 60 Fed. Reg. at 12,168). The court rejected that interpretation because the Act does not explicitly mention adjudication as a prerequisite to a finding of disability; because no other part of the Act "differentiates between claims adjudicated within twelve months, and claims adjudicated after twelve months"; and because "under the Commissioner's interpretation, a finding of disability, or entitlement to benefits or a trial work period, would be determined, in part, by when the Commissioner adjudicated a claim." *Id.* at 13a-14a.

REASONS FOR GRANTING THE PETITION

The court of appeals in this case set aside the Commissioner's longstanding—indeed, decades-old—construction of a fundamental provision of the Social Security Act, holding that claimants are entitled to disability insurance benefits under Title II and Supplemental Security Income (SSI) benefits under Title XVI of that Act even though they are able to work within a year of the onset of their disabilities, so long as the underlying impairment has lasted or can be expected to last more than 12 months. That decision is in direct conflict with the decision of the Tenth Circuit in *Alexander* v. *Richardson*, 451 F.2d 1185 (1971), cert. denied, 407 U.S. 911 (1972), and the decision of the Eighth Circuit in *Titus* v. *Sullivan*, 4 F.3d 590, 594-595 (1993). If allowed to stand, it would impose an estimated $9.8 billion in additional costs on the Social Security disability programs over the next 10 years in the Fourth Circuit alone, and would impose more than $80 billion in additional costs over that same period if applied nationwide. Finally, the court of appeals' decision fundamentally misconstrues the Social

Security Act, converting programs that were intended to address long-term disabilities into short-term disability programs that Congress specifically declined to enact.

1. The court of appeals' decision in this case squarely conflicts with those of two other circuits. Invalidating the Commissioner's longstanding construction and application of the Social Security Act, the court of appeals held that the Act does not require—and in fact unambiguously forecloses the Commissioner from interpreting it to require—that a claimant's disability (*i.e.*, the inability to work on account of an impairment) last or be expected to last at least 12 months. Instead, the court held, a claimant is entitled to benefits under both the disability insurance program established by Title II and the SSI program established by Title XVI where the claimant's inability to engage in substantial gainful activity has not lasted and is not expected to last 12 months, so long as the impairment that allegedly gave rise to that inability lasts or is expected to last at least 12 months. App., *infra*, 11a.

Two other courts of appeals, however, have reached the opposite conclusion. In *Alexander* v. *Richardson*, *supra*, for example, the Tenth Circuit affirmed the denial of benefits because "this disability extended for a period of less than twelve months, although there was an impairment which lasted for more than one year." 451 F.2d at 1186. The court explained:

> To recover disability benefits under the Act an applicant must be unable to engage in any substantial gainful activity. Disability is established by showing a medically determinable mental or physical impairment which prevents [the applicant from] engaging in any gainful activity. Inability to engage

> in any gainful activity and the impairment which causes it cannot be separated. The two components of disability must exist at the same time.

Ibid. The court further concluded that the history of the 1965 amendments to the Social Security Act, which introduced the 12-month duration requirement, showed that Congress intended to require that the *disability*—*i.e.*, the inability to work on account of the impairment—and not merely the impairment itself last at least 12 months. Congress, the court explained, expressly declared that it sought to require that insured workers be or be expected to be "*totally disabled*," *i.e.*, unable to work, for the entire 12-month period. See *id.* at 1187. The Eighth Circuit followed *Alexander* in *Titus*, 4 F.3d at 594 ("We agree with the district court that the interpretation of 'duration of impairment' was settled in *Alexander v. Richardson*, 451 F.2d 1185 (10th Cir. 1971).").

2. The court of appeals' decision, moreover, has profound programmatic and fiscal implications for the Social Security programs. The question of how long a claimant's disability must last or be expected to last in order for the claimant to be entitled to benefits is one of the most fundamental issues in the administration of the Title II and Title XVI disability programs, in which approximately two million claims are filed annually. As noted above, it is the longstanding position of the Commissioner that benefits are not awarded where the claimant was capable of returning to work within 12 months after the onset of the inability to engage in substantial gainful activity, and millions of claims have been denied on that basis since the 12-month duration requirement was enacted in 1965. The court of appeals' decision thus represents a dramatic departure from the

way the disability programs long have been administered.

The fiscal impact of that departure, moreover, is potentially enormous. Obviously, many claimants who are capable of working will have impairments that will last for longer than a year. See, *e.g.*, *Alexander*, 451 F.2d at 1186 ("For example, an applicant may have an injury from which he has lost one of his hands. The result is a physical impairment for the remainder of his life, but if he is able to engage in any gainful activities within a year from his injury he is not entitled to benefits."). We have been informed by the Social Security Administration that its Office of the Chief Actuary estimates that, in the Fourth Circuit alone, the increase in disability insurance benefits and SSI payments that would result from complying with the decision would cost the Social Security programs approximately $9.8 billion over the next ten years (2002-2011); if the decision were applied nationwide, the estimated additional costs would be $80 billion.[5]

The court of appeals' decision, if allowed to stand, would also have a substantial impact on the agency's ability to administer the program effectively. Because the decision relaxes the standards of eligibility for disability insurance benefits under Title II and for SSI benefits under Title XVI, it may dramatically increase the number of applications the agency must process;

[5] These estimates may in fact prove somewhat conservative. For example, the estimates are based on the number of denials on duration grounds under current experience; they do not attempt to account for the increase in applications for benefits that would be caused by the court of appeals' decision. Because the decision below relaxes the requirements to qualify for benefits, a substantial increase in the number of applications appears likely if the decision is not reversed.

the agency already must process several million applications under those programs each year. The impact may be particularly profound in the context of Title XVI's SSI program. As discussed above, the disability insurance program of Title II imposes a five-month waiting period; thus, even if the applicant's disability is expected to last at least 12 months from the outset, the applicant is not eligible for benefits until the disability has lasted at least five months. 42 U.S.C. 423(c)(2)(A). Unlike Title II, however, Title XVI does not impose a waiting period.[6] Thus, under the court of appeals' decision, SSI benefits must be paid if an impairment causes an inability to work of *any duration*. It is unlikely that Congress intended such a result, or to impose the resulting burdens on the agency.

The extent to which the court of appeals' decision undermines the fundamental premises of the Act is underscored by its effect on the application of other provisions of the Act. For example, under 42 U.S.C. 423(f)(1), the Commissioner may terminate benefits where "the individual is now able to engage in substantial gainful activity" *if* "there has been any medical improvement in the individual's impairment." Because the court of appeals' decision permits individuals to obtain benefits even if their impairments no longer prevent them from engaging in substantial gainful activity, it would make terminations under Section 423(f)(1) problematic. Where the individual already can work notwithstanding the impairment—where maximum medical improvement has already been

[6] To the extent the court of appeals intended to suggest otherwise, see App., *infra*, 9a n.7, it was mistaken. The statutory provisions cited in that footnote apply only under Title II of the Act; they do not apply under Title XVI.

achieved—at the time the award is made, it may prove difficult if not impossible to show further "medical improvement" that could be a basis for termination. The agency therefore could be required to continue paying benefits indefinitely to individuals who can work notwithstanding their impairments because it cannot show "medical improvement" between the date of the award and the date of the proposed termination. See 20 C.F.R. 404.1594.

3. The court of appeals' decision rests on an erroneous interpretation of the Act and a misapplication of *Chevron* deference principles. The court emphasized that the definition of disability requires that the *impairment* last 12 months. App., *infra*, 7a-8a. The court, however, ignored two critical features of the statutory framework. First, the definition of disability requires not only an underlying medical impairment that has already lasted or can be expected to last in the future for at least 12 months, but also an inability to engage in substantial gainful activity "by reason of" that impairment. 42 U.S.C. 423(d)(1)(A). The inability to work and the impairment giving rise to that inability are thus directly linked. Where, as here, the claimant returns to work within 12 months, he does not meet the definition of disability, because he does not have, for the duration of the 12-month qualifying period, an inability to work "by reason of" the underlying impairment. *Alexander*, 451 F.2d at 1186 ("[i]nability to engage in any gainful activity and the impairment which causes it cannot be separated"). Second, the court ignored Section 423(d)(2)(A), which was added to the definition of disability in 1967 and provides that an individual is disabled "only if" the impairment is "of such severity" that it precludes substantial gainful activity. Where the individual is able to engage in substantial gainful

activity, the impairment is not sufficiently severe and the individual cannot be considered disabled. In this case, the court of appeals effectively read out of the Act Section 423(d)(2)'s command that the claimant be considered disabled "only if" he is unable to work.

Furthermore, the legislative history of the 1965 amendments to the Social Security Act demonstrates that Congress intended to require that the disability (and not merely the impairment) last 12 months. When Congress first imposed the 12-month duration requirement in 1965, it rejected a shorter six-month period proposed in the House of Representatives' version of the bill. Explaining that decision, the Senate Finance Committee noted that the "the House provision could result in the payment of disability benefits in cases of short-term, temporary disability." S. Rep. No. 404, 89th Cong., 1st Sess. 98 (1965). "Under the House provision," the committee explained, "benefits could be paid for several months in cases of temporary disability resulting from accidents or illnesses requiring a limited period of immobility." *Ibid.* To avoid awarding benefits in cases of only temporary disability, the Senate committee believed it "necessary to require that a worker be *under a disability* for a somewhat longer period than 6 months in order to qualify for disability benefits." *Ibid.* (emphasis added). By eliminating the requirement that the inability to engage in substantial gainful activity must last 12 months, the court of appeals' decision creates precisely the short-term disability benefits program Congress sought to avoid. And that result conflicts with Congress's intent, evident throughout the legislative history, that the *disability* last 12 months. See *id.* at 98 (bill modified "to provide for the payment of disability benefits for an insured worker who has been or can be expected to be *totally disabled*

throughout a continuous period of 12 calendar months").[7]

At the very least, in light of the text, structure and legislative history of the Act, the Commissioner's long-standing interpretation of the definition of disability is reasonable and therefore entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). As a matter of grammar, the court of appeals was correct in concluding that Section 423(d) expressly requires the *impairment* to last at least 12 months, as does Section 1382c(a)(3)(A), which governs the SSI program. But the court of appeals was incorrect to assert that the Act thereby unambiguously *precludes* the Commissioner from requiring that the disability—the inability to engage in substantial gainful activity by reason of the impairment—last 12 months as well. The Act nowhere expressly declares that there is no minimum duration requirement for the disability itself, and requiring the disability to be co-extensive with the underlying impairment for the qualifying 12-month period is the most sensible construction of the Act. Titles II and XVI of the Act are designed to provide *disability* benefits to those who cannot engage in substantial gainful activity, not to provide *impairment* benefits to

[7] It is no answer to note that disability insurance benefits are not paid until after a five-month waiting period. As the legislative history discussed in the text makes clear, Congress considered even a six-month disability to be too short or temporary in nature to warrant the payment of benefits under Title II. Moreover, there is no waiting period for SSI benefits, which means that an SSI claimant apparently would be entitled to receive benefits under the court of appeals' decision for a disability of *any* duration, so long as the underlying impairment lasts or is expected to last 12 months or more.

those who can. By contrast, the court of appeals offered no plausible reason why Congress would have insisted that the underlying impairment last for 12 months but at the same time insisted that the claimant's inability to work have no minimum duration.

4. The court of appeals' invalidation of the Commissioner's regulations governing the availability of trial work periods under 42 U.S.C. 422(c) also warrants this Court's review. Indeed, the court's ruling that respondent was entitled to a trial work period appears to stand or fall with its resolution of the question of whether respondent was entitled to disability benefits notwithstanding his return to substantial gainful activity within 12 months of the onset of his inability to work. The court of appeals concluded that respondent's claim to a trial work period was "conclusively settled" in his favor by the court's earlier conclusion that he was entitled to disability benefits. App., *infra*, 9a.[8]

The court of appeals, moreover, gave the Commissioner's construction of the Act inappropriately short shrift. The Commissioner has consistently construed

[8] The court of appeals does not appear to have construed the trial work period provision independently of its interpretation of the duration requirement. To the extent the court of appeals' decision could be read as holding that respondent was entitled to a trial work period notwithstanding the 12-month duration requirement because his inability to work was, at some point after onset, "expected to last" 12 months—even though he had resumed substantial gainful activity before the expiration of that 12-month period—such a holding would not affect the need for plenary review. That holding would itself conflict with the decision by the Fifth Circuit in *Cieutat* v. *Bowen*, 824 F.2d 348, 358-359 (1987). As that court correctly held, the trial work provision precludes the Commissioner "only from considering work done *after* disability commences and only for purposes of determining whether the disability has *ceased*." *Ibid.*

Section 422 as making a trial work period available only where the impairment has precluded substantial gainful activity for 12 continuous months, or where there has been a determination that it can be expected to do so. See S.S.R. 82-52 (Cum. Ed. 1981-1985); 65 Fed. Reg. 42,787 (2000) (to be codified at 20 C.F.R. 404.1592(d)(2) (2001)) ("You are not entitled to a trial work period" if "you perform work demonstrating the ability to engage in substantial gainful activity within 12 months of the onset of the impairment(s) that prevented you from performing substantial gainful activity and before the date of any notice of determination or decision finding that you are disabled."). The Commissioner explained:

> Because section [422(c)] provides that a trial work period shall begin with the month in which a person becomes entitled to title II disability benefits, a claimant who does not become entitled to disability benefits cannot receive a trial work period. Under our interpretation of the duration requirement, a person cannot be found to be under a disability if he or she performs work demonstrating the ability to perform substantial gainful activity within 12 months after onset and before we have issued any notice of determination or decision finding disability. * * * On the other hand, if a claimant returns to work before we have made a determination or decision finding disability, but more than 12 months from onset, the duration requirement may be satisfied * * *, the claimant may become entitled to benefits, and the work may be protected by the trial work period even though the work began prior to a finding of disability.

65 Fed. Reg. at 42,774.

The court of appeals expressed concern that the Commissioner's construction of the Act has the potential to yield different results based on when the disability determination is made. App., *infra*, 13a ("under the Commissioner's interpretation, a finding of disability, or entitlement to benefits or a trial work period, would be determined, in part, by when the Commissioner adjudicated a claim"). The court reasoned that, if the disability determination is made within 12 months of onset, and at that point the disability was "expected to last" 12 months, an individual could be entitled to a trial work period even though he or she later returns to work before 12 months lapse. If the disability determination were made after the claimant has already returned to work, however, the individual would be found not disabled. *Ibid.*

The court of appeals' reasoning is unsupported. As the Commissioner explained, Congress permitted the agency to find a disability "based on an impairment which 'can be expected to last' 12 months"—rather than limiting the agency to finding disability where the impairment had *already* lasted 12 months—in order "to provide a means for [the agency] to adjudicate disability claims without having to wait 12 months from onset, rather than to permit claims to be allowed in the face of specific evidence that the claimant's impairment did not, in fact, prevent him or her from engaging in substantial gainful activity for 12 continuous months." 65 Fed. Reg. at 42,774. The court of appeals nowhere offered an alternative explanation for the "expected to last" language in the definition of disability. Moreover, although the Commissioner's construction might cause disability determinations to depend, in a few cases, on when the determination is made, Congress was aware of that possibility and specifically chose to permit it.

S. Rep. No. 404, *supra*, at 99 ("[W]here disability has existed for 12 calendar months or more, no prognosis would be required. Where a worker has been under a disability which has lasted for less than 12 months, the bill would require only a prediction that the worker's disability will continue for a total of at least 12 calendar months after onset of the disability.").[9] The Commissioner's interpretation, which is consistent with Congress's intent as well as the text of the Act, is at the very least reasonable and therefore should be sustained.[10]

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[9] The court of appeals' other reasons for rejecting the Commissioner's interpretation of the expectancy provision also lack merit. First, the court rejected that interpretation because the Act does not explicitly mention adjudication as a prerequisite to a finding of disability. App., *infra*, 13a. But the Act does permit a finding of disability when the inability to perform substantial gainful activity "can be expected" to last 12 months. The Commissioner reasonably concluded that the relevant expectation is that found by the adjudicator at the time of the disability determination. Second, the court observed that no other part of the Act "differentiates between claims adjudicated within twelve months, and claims adjudicated after twelve months." *Ibid.* But no other part of the Act contains similar statutory language.

[10] In this particular error, the Fourth Circuit has considerable company. The Sixth, Seventh, Eighth, and Tenth Circuits have all misapplied the trial work provisions. See App., *infra*, 13a n.10. Under those cases, joined by the Fourth Circuit here, a claimant is entitled to a trial work period if at some point the claimant's inability to work can be expected to last 12 months even if, at the time the claim is adjudicated, 12 months have passed and the claimant has returned to work during that period. See *Salamalekis* v. *Commissioner of Soc. Sec.*, 221 F.3d 828, 834 (6th Cir. 2000); *Walker* v. *Secretary of Health and Human Servs.*, 943 F.2d 1257, 1260 (10th Cir. 1991); *McDonald* v. *Bowen*, 818 F.2d 559, 564 (7th Cir. 1986); *Newton* v. *Chater*, 92 F.3d 688, 694 (8th Cir. 1996). As explained above, the 12-month duration requirement applies to the disability—both the impairment and the resulting inability to work. Accordingly, review of the first question presented will cause the Court to decide whether the trial work provisions apply to a claimant who returns to work less than 12 months after the onset of his disability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1016

CLEVELAND B. WALTON, PLAINTIFF-APPELLANT

v.

KENNETH S. APFEL, COMMISSIONER OF
SOCIAL SECURITY, DEFENDANT-APPELLEE

Argued: Oct. 30, 2000
Decided: Dec. 18, 2000

Before: NIEMEYER and LUTTIG, Circuit Judges, and WILLIAMS, United States District Judge for the District of Maryland, sitting by designation.

Affirmed in part, reversed in part, and remanded by published opinion. Judge LUTTIG wrote the opinion, in which Judge NIEMEYER and Judge WILLIAMS joined.

OPINION

LUTTIG, Circuit Judge:

Cleveland B. Walton appeals the district court's grant of summary judgment affirming the decision by the Commissioner of the Social Security Administration

that Walton was not entitled to disability insurance benefits and supplemental security income under the Social Security Act. The Commissioner's denial of benefits, and the district court's affirmance of that decision, were pursuant to a regulatory interpretation of the Social Security Act by the Social Security Administration, which interpretation provides that a return to work prior to the lapse of a 12 month period after onset of disability and prior to the adjudication of disability precludes a finding that a claimant is disabled and does not allow the award of a trial work period. We hold that the agency interpretation upon which the district court and the Commissioner relied clearly contravenes the relevant, and unambiguous, provisions of the Social Security Act. *See* 42 U.S.C. §§ 423(d)(1)(A); 422(c)(3). Accordingly, we reverse the judgment of the district court granting summary judgment to the Commissioner and denying summary judgment to Walton, except with regard to the district court's conclusion that Walton began "substantial gainful activity" ("SGA")[1] in October 1995, when his earnings exceeded $500, which latter holding we affirm.

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[1] Substantial gainful activity is "work activity that is both substantial and gainful," and that involves "doing significant physical or mental activities." 20 C.F.R. §§ 404.1572, 416.972. According to the statutory guidelines, earnings between $300 and $500 per month may be deemed SGA, while earnings in excess of $500 per month create a rebuttable presumption of SGA. 20 C.F.R. §§ 404.1574(b)(2)(vii), 416.974(b)(2)(vii); *see also Payne v. Sullivan*, 946 F.2d 1081, 1083 (4th Cir. 1991). Moreover, the Commissioner considered the nature of appellant's work and his ability to do that work, in addition to his earnings. In this case, the regulations defining substantial gainful activity are reasonable, 42 U.S.C. § 405(a), the decision that appellant's October 1995 earnings were

I.

Cleveland B. Walton ("Walton"), a college graduate in his mid-thirties with a history of psychological problems, was diagnosed with schizophrenia after a six-day period of hospitalization in March 1995. He applied for disability insurance benefits ("DIB") and supplemental security income ("SSI") under the Social Security Act ("Act") on April 12, 1995, based on his claimed mental impairment—schizophrenic disorder with associated depression. His application was denied initially and upon reconsideration.

After an evidentiary hearing on July 10, 1996, an Administrative Law Judge ("ALJ") concluded that Walton was disabled by his mental impairment; at the request of the ALJ, Dr. Elliott J. Spanier, a board-certified psychiatrist, reviewed appellant's medical records and opined that Walton suffered from schizophrenic disorder with psychotic features, that the impairment met the criteria of a listed impairment,[2] and that the impairment had lasted 12 months.

Prior to his hearing before the ALJ, Walton advised the ALJ that he had worked at Food Lion from May 1995 until December 10, 1995, for five or six hours a day, and that he had begun working full-time at the same job on December 10, 1995. Based on this infor-

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SGA was supported by substantial evidence, and we affirm this part of the district court's judgment.

[2] A listed impairment is an impairment "considered severe enough to prevent a person from doing any gainful activity." 20 C.F.R. § 404.1525(a).

mation, the ALJ denied Walton a trial work period[3] because Walton had demonstrated the capacity for sustained work since May 1995, and because his disability ceased when he began working full time.

Instead, the ALJ held that Walton was entitled to benefits pursuant to a period of disability that commenced on the amended onset date of his impairment, October 31, 1994—the date his employment as an in-school suspension teacher was terminated—and ended on December 10, 1995—the date Walton started to work full-time at Food Lion.

Subsequently, the Social Security Administration (SSA) determined that Walton may have begun SGA within twelve months of his onset date. Based on agency policy, Walton was not disabled, and was not entitled to benefits, if he had returned to work that constituted SGA within twelve months of his disability onset date and prior to adjudication of his claim, even if his impairment had lasted or was expected to last for a continuous period of not less than 12 months. Consequently, the case was remanded to the ALJ to assess when Walton began SGA.

Substantial evidence that Walton remained mentally impaired was presented at the second hearing. However, the ALJ did not reach the issue of impairment because he concluded that Walton returned to SGA in October 1995, when his earnings from his part-time work as a grocery store cashier and stocker exceeded

[3] A trial work period permits qualified claimants to test their ability to work for up to nine months and still be considered disabled. *See* 42 U.S.C. § 422(c); 20 C.F.R. § 404.1592.

$500.[4] And, because Walton was not unable to engage in SGA for a continuous period of at least twelve months from his disability onset date, the ALJ determined that he was not disabled and not entitled to a trial work period, and therefore denied him benefits.

Walton sought review of the ALJ's decision, which stands as the final decision of the Commissioner of the Social Security Administration ("Commissioner"). The district court adopted the proposed memorandum opinion of the magistrate judge and granted summary judgment to the Commissioner, holding that the Commissioner's decision that Walton engaged in SGA in October 1995 and was not disabled and entitled to benefits, was supported by substantial evidence, and that Walton was not entitled to a trial work period absent a finding of disability and entitlement to benefits. This appeal followed.

II.

Walton does not deny that he worked in October 1995. Rather, he claims, *inter alia*, that his work in October 1995 did not constitute SGA[5] and that, even if the work did constitute SGA, the district court improperly relied upon it because that SGA was part of a trial work period and, as such, could not be used as evidence

[4] Under the Act's sequential evaluation process, the disability inquiry will end at the first step, and the claimant will be found not disabled, irrespective of impairment, if he has engaged in SGA. 20 C.F.R. §§ 404.1520(b), 416.920(b). As discussed *infra* at [10a], SGA during a trial work period is ignored, and will not end the evaluation process. 42 U.S.C. § 422(c)(2).

[5] We affirm that portion of the district court's opinion. *See supra* n. 1.

that he was not disabled. The Commissioner does not dispute that Walton suffered from a mental impairment, nor does he dispute that the impairment lasted for a continuous period of at least 12 months. Instead, the Commissioner asserts that the district court properly upheld the denial of benefits because, pursuant to the Act and agency policy, Walton was not under a disability when he engaged in SGA during October 1995, prior to the lapse of twelve months from his disability onset date and prior to adjudication of his claim. Further, the Commissioner claims that because Walton was not disabled, he was not entitled to a trial work period.

The Commissioner insists that his position is based on the plain language of the statute and that, even if the language of the Act were susceptible to another interpretation, deference is owed to the agency's interpretation of the Act. Appellee's Br. at 24. This interpretation is expressed in Social Security Ruling (SSR) 82-52 and Notice of Proposed Rule-making, 60 Fed. Reg. 12166 (March 6, 1995) ("NPRM").[6]

While we recognize *Chevron* deference where such deference is due, *see generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984), we nonetheless reject the Commissioner's judgment in this case. In the first place, agency interpretation of the Act is not appropriate because the language of the statute is clear and unambiguous. Moreover, even if interpretation were required, the Commissioner's interpretation

[6] This proposed regulation (which reflects the position of SSR 82-52) became effective on August 10, 2000, and does not apply retroactively to Walton's case.

—which assumes either a duration period or adjudication requirement and does violence to the grammatical structure of the statute—conflicts with the very statute it purports to elucidate. We are bound to reject such constructions. *Id.* at 843 & n. 9, 104 S. Ct. 2778.

Consequently, the district court's holding that Walton was not under a disability when he engaged in SGA prior to the lapse of twelve months from his onset date and prior to adjudication of his claim, and its holding that Walton was not entitled to a trial work period, are reversed.

A.

Beyond question, the statutory language speaks clearly to the issue of whether an individual can be under a "disability," even though he engaged in SGA prior to the expiration of a twelve-month period from his disability onset date and prior to the adjudication of his disability and an award of benefits. The statutory language is unambiguous, requires no agency interpretation, and leaves no doubt that neither a duration requirement for the inability to engage in substantial gainful activity nor a requirement that the benefits have been "awarded" or adjudicated, exists. Rather, the relevant provision, 42 U.S.C. § 423(d)(1)(A), defines "disability" simply as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

In addition to the facial clarity of the language, the grammatical structure and logic of the statute further

compel the conclusion that the clause, "which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months," refers to the impairment, not to the inability to engage in SGA; the clause manifestly does not modify "substantial gainful activity."

In the first place, based solely on grammar and sentence structure, the clause modifies the prepositional phrase "by reason of any medically determinable physical or mental impairment." Additionally, a single referent for the *entire* adjectival phrase must exist. Thus, as a matter of pure logic, it is clear that the duration clause *must* modify impairment, and only impairment, because to hold otherwise would lead to the absurd construction dictated by the Commissioner's interpretation, that "[d]isability is the inability to engage in substantial gainful activity . . . which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." Obviously it is the impairment, and not the SGA, that Congress believed could lead to death, and it is thus the impairment, and not the SGA, which is subject to the "not less than twelve months" requirement. We decline to construe it otherwise.

Accordingly, we hold that a claimant whose impairment was "expected to result in death," or which "lasted" or "was expected to last" for a continuous period of not less than twelve months may be disabled, even if the inability to engage in substantial gainful activity does not cause death or actually persist for twelve months. 42 U.S.C. § 423(d)(1)(A). Moreover, such individual *becomes entitled* to disability insurance benefits, if under a disability, for each month *after the*

five-month waiting period imposed by section 423(c)(2)[7] if the individual (1) is insured for disability benefits; (2) is below retirement age; and (3) has filed an application for benefits. 42 U.S.C. § 423(a).

In this case, the ALJ found in the first hearing that Walton was disabled and had an impairment that had lasted for twelve months from the disability onset date in October 1994. It is further undisputed that Walton did not engage in a successful work attempt until May 1995, two months after the five-month waiting period, and did not engage in SGA until October 1995, well after the five-month waiting period had elapsed. Consequently, Walton met the statutory prerequisites for entitlement to disability insurance benefits.

Walton's claim that he was entitled to a trial work period is likewise affirmed by the statutory language. For, whether Walton is entitled to a trial work period, in light of his return to part-time work in May 1995 and SGA in October 1995, is conclusively settled by the determination that Walton was disabled and entitled to disability benefits after the five-month waiting period, *i.e.*, beginning in April 1995.

Contrary to the Commissioner's position, the statute allows a trial work period to begin prior to twelve months from the disability onset date, and before benefits are granted. Unambiguously, the statute provides that a "period of trial work . . . *shall begin* with the

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[7] There is no entitlement to receive benefits until after this waiting period, which refers to the earliest period of five consecutive calendar months "throughout which the individual with respect to such application is filed has been under a disability." 42 U.S.C. § 422(c)(2); *see also* 42 U.S.C. § 423(a).

month in which [the claimant] *becomes entitled* to disability insurance benefits." 42 U.S.C. § 422(c)(3) (emphasis added). And, as discussed *supra*, Walton met the requirements of 42 U.S.C. § 423(a) and was entitled to disability insurance benefits as of April 1995.

Under the statute, "any services rendered by an individual during a period of trial work will be deemed not to have been rendered by such individual in determining whether his disability has ceased in a month during such period." 42 U.S.C. § 422(c)(2).[8] Thus, given that Walton's trial work period precludes consideration of the October 1995 SGA, Walton meets even the Commissioner's extra-statutory requirements for a finding of disability, because no SGA during the period of twelve months from his disability onset date, October 31, 1994, could have been considered.

Consequently, in light of our holdings that Walton was under a "disability," "entitled to disability benefits," and "entitled to a trial work period," we must also hold that the district court's consideration of the October 1995 SGA as evidence that Walton had engaged in SGA prior to the expiration of twelve months from his disability onset date was in contravention of the Act.

B.

Even if the statute we interpret herein were ambiguous, and thus susceptible to interpretation, we would nonetheless reject as unreasonable the Commissioner's

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[8] Once the trial work period is over, the agency can consider the work done during the work period in determining whether the disability has ended after the work period. 20 C.F.R. § 404.1592(a).

contrary interpretation, which rests on the premise that it is the "inability to engage in any substantial gainful activity" which must "last" or "be expected to last for a continuous period of not less than 12 months." And, it is based on this supposition that the Commissioner concludes that the definition of disability—and a prerequisite for entitlement to a trial work period—includes the requirement that *either* the impairment *must have prevented SGA* for a period of no less than twelve months *or* the claim must have been *adjudicated* and benefits awarded. *See* 60 Fed. Reg. 12166, 12168; SSR 82-52. It is clear, however, that the Commissioner's position is directly belied by the language, structure, and grammar of 42 U.S.C. § 423(d)(1)(A).

For, to obtain the outcome the Commissioner desires, one is required in the first instance to separate a single adjectival clause in section 423(d)(1)(A)— "which can be expected to result in death or has lasted or is expected to last in excess of twelve months"—so that "which can be expected to result in death" modifies only "impairment," while "which has lasted or can be expected to last" modifies both impairment and "inability to engage in substantial gainful activity." There is no mode of statutory construction which allows such. As discussed *supra* at [8a], parts of a single adjectival phrase cannot modify different antecedents. The only logical referent for both constituents parts of the clause is "impairment."

We further conclude that the agency's interpretation is contrary to the clear statutory language in other respects. For example, while the Commissioner *accepts* "an award of benefits" as an alternate requirement to being unable to engage in SGA for a period of twelve

months, "an award of benefits" is nowhere to be found in the statutes that define "disability" and outline the parameters of "trial work period." Additionally, though the Commissioner seeks to make the trial work period, as well as a finding of disability, contingent upon either the duration of SGA or adjudication,[9] *see* 60 Fed. Reg. 12166, 12168; SSR 82-52, the "shall begin" language in 42 U.S.C. § 422(c)(3) is conditioned *only* on being "eligible to receive benefits," as determined under section 423(a)(1). The conflict between the statute and the agency interpretation is both apparent and significant.

The Commissioner seeks to reconcile this apparent tension by reference to the use of different verb tenses within 42 U.S.C. § 423(d)(1)(A). We are told that the Congress included the "expected to last" language in section 423(d)(1)(A) so that the SSA can "adjudicate disability claims without having to wait 12 months from the alleged onset of disability, rather than to permit claims to be allowed in the face of evidence that the claimant's impairment did not prevent substantial gainful activity for 12 continuous months." 60 Fed. Reg. 12166, 12168. In support of this position, appellee points to the fact that in its "definition of 'disability,' Congress used two different verb tenses to provide for the fact that the Agency would decide claims at two different times relative to the onset of a claimant's disability." Appellee's Br. at 14.

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[9] The Commissioner's "interpretation" mandates that a trial work period may "not be awarded when a claimant performs work demonstrating the ability to engage in substantial gainful activity within 12 months after the alleged onset of disability and prior to an award of benefits." J.A. 97.

If for no other reason, juxtaposition of this "verb tense" analysis with the timing of agency adjudication exposes its weakness, and makes the argument unpersuasive as a statutory matter. As an initial matter —and significantly—neither section 423(a)(1) nor section 423(d)(1)(A) even *mentions* adjudication as a prerequisite to "disability" or "entitlement to disability benefits." Second, no part of the Act of which we are aware differentiates between claims adjudicated within twelve months, and claims adjudicated after twelve months, a distinction upon which the Commissioner's verb tense analysis rests. Lastly, under the Commissioner's interpretation, a finding of disability, or entitlement to benefits or a trial work period, would be determined, in part, by when the Commissioner adjudicated a claim; we decline to make findings and entitlements of such nature turn upon the vagaries of agency efficiency.

In sum, the Commissioner's position, grounded in SSR 82-52 and the NPRM, is both in actual conflict with the statutory language and unreasonable, and our duty is therefore clear—we must reject the agency interpretation and apply the statute as enacted.[10]

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[10] We join no fewer than four other circuit courts of appeal in the assessment that the agency's position contradicts the plain language of the governing statute. *See Salamalekis v. Commissioner of Social Security*, 221 F.3d 828, 832 (6th Cir. 2000) (agency position and SSR 82-52 an invalid interpretation of the Act); *Newton v. Chater*, 92 F.3d 688, 693-94 (8th Cir. 1996) (trial work period starts in the month that disability entitlement begins, *i.e.*, after five-month waiting period; agency ruling is inconsistent with the statutory provisions); *Walker v. Secretary of Health and Human Services*, 943 F.2d 1257, 1259-60 (10th Cir. 1991) (same); *McDonald v. Bowen*, 818 F.2d 559, 564 (7th Cir. 1987) (same).

For the above reasons, those portions of the judgment of the district court affirming the Commissioner's conclusions that Walton is not disabled based on his return to SGA within twelve months of his onset date and is not entitled to a trial work period are reversed. However, that portion of the district court's judgment affirming the Commissioner's conclusion that appellant's work in October 1995 was SGA is affirmed. The case is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:98CV339

CLEVELAND B. WALTON, PLAINTIFF

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

[Filed: Oct. 20, 1999]

MEMORANDUM OPINION

Cleveland B. Walton appeals the final decision of the Commissioner of the Social Security Administration ("Commissioner") denying Walton's claim for disability insurance benefits ("DIB") and supplemental security income benefits ("SSI"). For the reasons which follow, the Commissioner's decision at issue is supported by substantial evidence, the Proposed Memorandum Opinion of the Magistrate Judge denying Walton's motion for summary judgment and granting the Commissioner's motion for summary judgment is approved.

PROCEDURAL BACKGROUND AND STATEMENT OF FACTS

Walton was first hospitalized for depression with psychotic features in October 1990. Upon his release

five days later, Walton was treated with medication as an outpatient until he re-entered the hospital in May 1994, for depression. He was released ten days later and continued to receive medication and treatment as an outpatient until March 1995 when he was diagnosed with schizophrenia and hospitalized for approximately six days. Once again, Walton's condition stabilized and he was released and treated with medication as an outpatient. The record shows that Walton's mental health continued in that posture until April 12, 1995, when he filed his claims for SSI and DIB with the Social Security Administration.[1]

From 1992 through October 1994, Walton worked as an in-school suspension teacher which entailed supervision of students who were suspended from attending regular classes. After that employment was terminated, Walton worked for several different employers. These jobs, which the administrative law judge. ("ALJ") found were unsuccessful work attempts and therefore were not considered in determining whether Walton was able to perform substantial gainful activity, included: a salesman for a clothing store; a stocker at a department store; an unidentified position with the Post Office; an unidentified position with a survey service; and a stocker at a grocery store.

In May 1995, approximately three months after having been diagnosed with schizophrenia, Walton began working part-time at a grocery store as a cashier and stocker. By October 1995, Walton was earning more than $500 per month. On December 10, 1995, Walton

[1] Walton's mother filed a protective application for disability insurance benefits and supplemental security income on his behalf on March 14, 1995.

became a full-time employee and his hourly rate increased from $5.50 per hour to $6.50 per hour.

On April 12, 1995, Walton filed an application for DIB and SSI, alleging that he had been disabled since February 20, 1995, due to psychiatric impairments, i.e., a schizophrenic disorder with associated depression. The Commission determined that Walton's condition was not severe enough to prevent him from working because it was well controlled with medication. Thus, Walton's application was denied initially and upon reconsideration. An ALJ conducted a de novo review based on an evidentiary hearing on July 10, 1996, at which Walton was represented by counsel. At the hearing, Walton amended the date of the onset of condition from February 20, 1995 to October 31, 1994. Walton's mother, Joyce Walton, and vocational expert, Dr. Andrew V. Beale, also testified at the hearing.

On August 30, 1996, the ALJ issued a decision concluding that Walton was entitled to a period of disability commencing October 31, 1994, the alleged onset date of Walton's disability due to psychiatric impairments, and ending December 10, 1995, when Walton started to work full-time at the convenience store. The ALJ held that Walton was entitled to receive DIB and SSI benefits from October 31, 1994 until February 29, 1996, two months after the month in which his disability ceased, but that he was not entitled to a trial work period.[2] On December 11, 1996, the Commissioner's

[2] Walton's attorney argued that a trial work period was warranted in this case. A trial work period would allow Walton to have worked an additional nine months while receiving benefits. Thus, a trial work period is an opportunity for an applicant to "test his ability to work and still be considered disabled." 20 C.F.R.

Appeals Council vacated and remanded the ALJ's decision based on additional evidence which showed that Walton had engaged in substantial gainful activity prior to the lapse of the twelve months after the onset date of his disability on October 31, 1994.

On August 15, 1997, after a second hearing, the ALJ held that, beginning in October 1995, when his earnings consistently were in excess of $500 per month, Walton's work activity as a grocery store cashier and stocker constituted substantial gainful activity. For that, reason, the ALJ determined that Walton was not entitled to a period of disability or DIB under sections 216(i) and 223 of the Social Security Act, and was not eligible for SSI under sections 1602 and 1614(a)(3)(A) of the Social Security Act.

DISCUSSION

A. Standard of Review

The task of judicial review is to determine whether there is substantial evidence to support the final decision of the Commissioner that Walton is not entitled to

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§ 404.1592(a). A trial work period begins with the month in which a claimant becomes entitled to DIB and ends with the close of the ninth month in which the claimant has performed services ("any activity, even though it is not substantial gainful activity, which is done by a person in employment or self-employment for pay or profit, or is the kind normally done for pay or profit." 20 C.F.R. 404.1592(b)) or with the close of the month in which new evidence, other than evidence relating to work done during the trial work period, shows that the claimant is not disabled. *See* 20 C.F.R. § 404.1592(e)(1), (2). The ALJ found that, a trial work period was not warranted because Walton had demonstrated the capacity for sustained work since May 1995. Further, if Walton is not entitled to DIB or SSI, he is not entitled to a trial work period.

DIB or SSI benefits. *See* 42 U.S.C. § 405(g). Substantial evidence is defined as "relevant evidence a reasonable mind might accept as adequate to support a conclusion. It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir. 1966). Consequently, a reviewing court should not substitute its judgment for that of the Commissioner. *See id.*; *see also Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990). "[T]he language of § 205(g) precludes a de novo judicial proceeding and requires that the court uphold the Secretary's decision even should the court disagree with such decision as long as it is supported by 'substantial evidence.'" *Blalock v. Richardson*, 483 F.2d 773, 775 (4th Cir. 1972). Thus, it is the duty of the court to determine whether there was substantial evidence to justify the Commissioner's decision.

B. Analysis

To qualify for DIB or SSI under the Social Security Act, a claimant must be disabled and must meet the earnings requirement as defined by the Act. "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §§ 416(i)(1)(A), 423(d)(1)(A), 1382c(a)(3)(A); *see e.g.*, *Stewart v. Apfel*, 182 F.3d 909 (4th Cir. 1999); *Pass v. Chater*, 65 F.3d 1200 (4th Cir. 1995); *Mullins v. Chater*, 53 F.3d 328 (4th Cir. 1995); *Rosa v. Callahan*, 168 F.3d 72 (2d Cir. 1999).

In addition, a claimant will be found to be under a disability:

> only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *see e.g.*, *Pass v. Chater*, 65 F.3d 1200 (4th Cir. 1995); *English v. Shalala*, 10 F.3d 1080 (9th Cir. 1993); *Bush v. Shalala*, 94 F.3d 40, 45 n.3 (2d Cir. 1996).

1. Substantial Gainful Activity

According to the Act, a claimant will be considered disabled "if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382(c)(a)(3)(A). Substantial gainful activity is "work activity that is both substantial and gainful." 20 C.F.R. §§ 404.1572, 426.972. Substantial work activity "involves doing significant physical or mental activities." 20 C.F.R. §§ 404.1572(a), 916.972(a). Work may be substantial even if it is part time. *See id.* Gainful work activity is work that is done for pay or profit. 20 C.F.R. §§ 404.1572(b), 416.972(b). The ALJ concluded that, beginning in October 1995, Walton's work as a cashier

and stocker at the grocery store was both substantial and gainful. The date claimed as the onset of disability was October 31, 1994, less than twelve months before he performed substantial gainful activity. For that reason, the ALJ held that Walton did not satisfy the durational requirement of 20 C.F.R. §§ 404.1505, 416.905.

The Commissioner has promulgated a five-step process to determine whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920. Under the regulations, the ALJ must consider whether the claimant (1) is working and the work he is doing is substantial gainful activity; (2) has a severe impairment; (3) has an impairment that meets or equals the requirements of a listed impairment; (4) has an impairment that prevents him from doing past relevant work; and (5) whether his impairment prevents him from performing other work. *See* 20 C.F.R. §§ 404.1520, 416.920; *see also*, *Hunter v. Sullivan*, 993 F.2d 31 (4th Cir. 1992) (discussing five step process). The claimant bears the burden of production and proof in the first four steps of the inquiry. *See Hunter v. Sullivan*, 993 F.2d 31, 35 (4th Cir. 1992). If the claimant discharges that obligation, the burden then shifts to the Secretary to show, in the fifth step, that other jobs exist in the national economy that the claimant can perform reconsidering his age, education, and work experience. *See id.*

If, at any point in the analysis, the ALJ finds that the claimant has not satisfied any step of the process, review does not proceed to the next step. *See* 20 C.F.R. §§ 404.1520, 416.920; *see also Hunter*, 993 F.2d at 35. Thus, if the ALJ determines that the claimant is working and the work he is doing is substantial gainful

activity, the Commissioner will find that he is not disabled without regard to his medical condition, age, education or work experience. *See* 20 C.F.R. §§ 404.1520(b), 416.920(b), *see also Pass v. Chater*, 65 F.3d 1200 (4th Cir. 1995).

Applying these principles, Walton was found to be engaged in substantial gainful activity and, therefore, he was not disabled within the meaning of the Act. Thus, the analysis ended at that step of the process and his claim was denied. There was substantial evidence in the record upon which the ALJ could reach that decision. Thus, even though Walton's condition met the requirements of a listed impairment (step three) the analysis never reached that stage.

Walton attacks the ALJ's findings and insists that he was not engaged in substantial gainful activity before the lapse of the twelve month duration requirement. Walton argues that the ALJ allegedly failed to properly average Walton's earnings and deduct impairment-related work expenses. For the reasons set forth below, Walton's arguments lack merit.

a. Walton's Earnings Create a Rebuttable Presumption of Substantial Gainful Activity.

According to the statutory guidelines, earnings in excess of $500 per month, for work done between January 1990 and June 1999, create a rebuttable presumption of substantial gainful activity. *See* 20 C.F.R. §§ 404.1574 (b)(2)(vii), 416.974(b)(2) (vii); *see also Payne v. Sullivan*, 946 F.2d 1081, 1083 (4th Cir. 1991); *Garnett v. Sullivan*, 905 F.2d 778, 780 n.1 (4th Cir. 1990); *Jones v. Shalala*, 21 F.3d 191, 192 (7th Cir. 1994). Beginning in October 1995, Walton's earnings were consistently in excess of $500 per month. Hence, the ALJ correctly

held that there was a rebuttable presumption that Walton was engaging in substantial gainful activity within twelve months of his alleged onset date.

Walton's argument that his out-of-pocket expenses for high blood pressure medication should be deducted from his total earnings to reduce his average monthly earnings is flawed. Although impairment-related work expenses may be deducted from earnings when deciding if the claimant has performed substantial gainful activity, only certain expenses qualify for the deduction. *See* 20 C.F.R. §§ 404.1576(c), 416.976(c). Examples of deductible drugs and medical services are anti-convulsant drugs to control epilepsy, anti-depressant medication for mental disorders, and radiation treatment or chemotherapy for cancer patients. The ALJ correctly held that blood pressure medication did not qualify as a deductible drug under the regulations because to be deductible, the drugs or services must be directly related to the claimant's impairment. *See* 20 C.F.R. §§ 404.1576(c)(5)(iii), 416.976(c)(5)(iii). The medication taken by Walton for his mental disorder was provided to him by a mental health agency and did not, therefore, represent an out-of-pocket expense. Thus, Walton's earnings should not have been reduced by any impairment-related expenses.

b. Walton Failed to Rebut the Presumption of Substantial Gainful Activity.

Walton sought to rebut the presumption of substantial gainful activity by arguing that, when his earnings are averaged over the entire period of time that he worked, his average earnings fall below $500 per month until December 1995. Thus, Walton argues that the

period in which he engaged in substantial gainful activity began in December 1995.

The ALJ relied on Social Security Ruling 83-35 in rejecting Walton's argument. Social Security Ruling 83-35 provides that "[w]hen there is significant change in work patterns or earnings during the period of work requiring evaluation, earnings are not averaged over the entire period of work involved. . . . the earnings must be averaged over each separate period of work involved to determine if either effort was SGA." SSR 83-35. The ALJ found that there was a "significant change in the claimant's ability to function and in his earnings (since he consistently earned in excess of $500 a month for months after October 1995, as compared to earnings averaging only $350 from June to September 1995)." Tr. at 15. Thus, the ALJ averaged earnings after October 1995 and found that Walton consistently earned in excess of $500 beginning in October 1995.

Walton also argues that, even if he did engage in substantial gainful activity within twelve months of the onset of his disability, he is nevertheless entitled to DIB because his impairment was *expected to last* more than twelve months. The ALJ pointed out that "the duration requirement provides that [the claimant] must be prevented from performing substantial gainful activity for a 12-month period even if his impairment lasted or was expected to last for 12 months." Tr. at 13. *See* 20 C.F.R. §§ 404.1520(b), 416.920(b) ("If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition . . .").

c. Even if Walton's Earnings Averaged Slightly Less Than $500 per Month, He Was Still Engaged in Substantial Gainful Activity.

The regulations provide "that the amount of a claimant's earnings *may* show that he engaged in substantial gainful activity. *See* 20 C.F.R. §§ 404.1574, 416.974 (emphasis added). However, the regulations also provide that "the fact that [a claimant's] earnings are not substantial will not necessarily show that [he] is not able to do substantial gainful activity." 20 C.F.R. §§ 404.1574(a), 416.974(a).

If a claimant's monthly income averages between $300 and $500 per month, the Commissioner will consider other factors to determine whether his work constitutes substantial gainful activity. *See* 20 C.F.R. §§ 404.1574(b)(6), 416.974 (b)(6); *Payne v. Sullivan*, 946 F.2d 1081, 1083 (4th Cir. 1991). For example, if Walton's work was comparable to that of unimpaired people in the community who have the same or similar occupations, that can serve as additional evidence that his work constituted substantial gainful activity. *See* 20 C.F.R. §§ 404.1574(b)(6)(i), 416.974(b)(6)(i).

In this case, even if Walton's monthly income averaged slightly less than $500 per month, other factors suggest that his work constituted substantial gainful activity. As the Magistrate Judge pointed out, "[t]here was no evidence that plaintiff was being subsidized or that he was provided any special considerations to continue his employment. In fact, Walton denied any such special consideration. There is no evidence that Walton was working in a sheltered or special environment or that he was not actually earning his pay." Mag. Proposed Mem. Op. at 4. Thus, there is

additional evidence that Walton's work constituted substantial gainful activity.[3]

CONCLUSION

The Commissioner's decision that Walton was not entitled to DIB or SSI was supported by substantial evidence. Therefore, Walton's objections to the Proposed Memorandum Opinion are overruled. The Proposed Memorandum Opinion is affirmed and, as approved herein, shall constitute the final decision of this Court.

The Clerk is directed to send a copy of this Memorandum opinion to all counsel of record.

It is so ORDERED.

/s/ ROBERT E. PAYNE
United States District Judge

Richmond, Virginia
Date: October 26, 1999

[3] Walton also argues that the ALJ erred by giving deference to the Commissioner's explanation of its policy despite the fact that the Commissioner relied on a non-final Social Security Ruling set forth in a Notice of Proposed Rulemaking. Given the resolution of the other arguments, it is unnecessary to address that one.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:98CV339

CLEVELAND B. WALTON, PLAINTIFF

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

ORDER

For the reasons set forth in the accompanying memorandum Opinion, it is hereby **ORDERED** that the Proposed Memorandum Opinion is affirmed and, as approved, shall constitute the final decision of this Court.

The Clerk is directed to send a copy of this Order to all counsel of record.

It is so ORDERED.

/s/ ROBERT E. PAYNE
United States District Judge

Richmond, Virginia
Date: October 26, 1999

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:98CV339

CLEVELAND B. WALTON, PLAINTIFF

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

[Filed: Apr. 14, 1999]

ORDER

Pursuant to Title 28 U.S.C. 636(b)(1)(c), it is **ORDERED** that the attached proposed memorandum opinion be, and the same hereby is, **FILED**. All parties are advised that they may file objections to the proposed memorandum opinion within twelve (12) days of the date hereof. Failure to object in writing setting forth with specificity the objection, may result in the Court's adopting the proposed memorandum and the entry of an order in accordance therewith.

Let the Clerk send a copy of this order, and a copy of the attached memorandum, to counsel for the plaintiff

and counsel for the defendant.

/s/ ILLEGIBLE
UNITED STATES MAGISTRATE
JUDGE

Date: April 14, 1999

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:98CV339

CLEVELAND B. WALTON, PLAINTIFF

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

[Filed: Apr. 14, 1999]

PROPOSED MEMORANDUM OPINION

Cleveland B. Walton, the plaintiff, brings this action for review of the final decision of the Commissioner of Social Security denying his claim for disability insurance benefits and supplemental security income under the Social Security Act. Jurisdiction is appropriate pursuant to 42 U.S.C. 405(g).

The plaintiff testified at an initial hearing before an administrative law judge (ALJ) on July 10, 1996, that he was 32 years old and had a BS degree in music education. He worked from November, 1992 to October, 1994 as a teacher. In November, 1994, he was employed in sales at a retail clothing store and in December, 1994, he worked in a grocery store. In May, 1995,

plaintiff worked parttime in the grocery store and became a full time employee on December 10, 1995. He said he became disabled in October, 1994, due to a psychiatric impairment. Joyce Walton, plaintiff's mother, testified that Walton had his first psychiatric in 1990 and was hospitalized in March, 1995. She said that his breakdowns occur when he forgets to take his prescribed medications. She did not believe that he could continue working without some support.

On August 30, 1996, the ALJ found that Walton had not worked from October 31, 1994 through December 10, 1995; that he had severe paranoid schizophrenia with depression and anxiety; that his impairment met listing 12.03A, B and C; that he was disabled since October 31, 1994; and that his disability terminated on December 10, 1995, when he returned to full-time work.

The Appeals Council found that Walton's work record since October 31, 1994, showed that he engaged in substantial gainful activity and remanded this matter to the ALJ to evaluate his work record since October 31, 1994.

On remand, a hearing was conducted by the ALJ on June 3, 1997, and plaintiff testified that he went back to work for Food Lion in June, 1995 and earned $354.00 a month through December, 1995, when he began earning $1,140.00 a month. He was suspended in March, 1996. Plaintiffs mother, Joyce Walton, testified that she has to remind him to take his medicine and she did not believe he would take them if he lived alone. She said her son was fired at Food Lion due to his failure to pay for food he had eaten.

On August 15, 1997, the ALJ found that Walton's monthly earnings averaged in excess of $500.00 in October, 1995 and since he has not been unable to engage in substantial activity for a continuous period of at least twelve months, he is not disabled.

The Appeals Council denied plaintiff's request for a review on April 3, 1998, and plaintiff appeals that final decision.

The medical evidence of record begins with a hospital record where plaintiff was hospitalized for major depression in October, 1990.

Plaintiff underwent a psychological evaluation in May, 1994, which resulted in a diagnosis of Major Depression with psychotic features.

On January 3, 1996, Dr. William A. Shepard completed a Medical Assessment of plaintiff's ability to perform work-related activities. He reported that "with medication management [Walton] carries out reasonable conversation and duties at a minimal scale". He concluded that Walton's lack of touch with reality even though maintained on medications still leaves him with defects that are possibly permanent.

On June 30, 1996, Dr. Elliott J. Spanier, a psychiatrist and medical advisor, opined that Walton's impairments met listing 12.03, that they have lasted or would be expected to last for a continuous period of not less than 12 months, and that his thought disorders, hallucinations, and paranoid thinking made it unlikely that he could engage in sustained work activity.

The issue is whether the final decision of the Commissioner is supported by substantial evidence. *Blalock v. Richardson*, 483 F.2d 773 (4th Cir. 1976).

The scope of judicial review in disability cases is narrow, and is limited to a determination of whether the final decision of the Commissioner is supported by substantial evidence in the record as a whole. *Richardson v. Prates*, 402 U.S. 389, 91 S. Ct. 1420 (1971). The Commissioner's factual findings are conclusive if they are supported by substantial evidence. "Substantial evidence" has been defined as being more than a mere scintilla, but something less than a preponderance. *Laws v. Celebrezze*, 368 F.2d 640 (4th Cir. 1966).

20 CFR 404.1571 provides, in part, "if you are able to engage in substantial gainful activity, we will find that you are not disabled." Section 404.1574(2)(vii) provides "We will consider that your earnings from your work activities as an employee show that you have engaged in substantial gainful activity if your earnings averaged more than $500 a month in calendar years after 1989". The Regulations define "Disability" as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

This case is unusual in that the medical evidence indicates that the plaintiff meets the requirements of a listed impairment during the period in question and would otherwise be found to be "disabled" except for the fact that the evidence shows that during this period of time the plaintiff was actually engaged in SGA. There was no evidence that plaintiff was being subsi-

dized or that he was provided special considerations to continue in his employment. In fact, plaintiff denied any such special consideration. There is no evidence that Walton was working in a sheltered or special environment or that he was not actually earning his pay. The ALJ correctly made an evaluation pursuant to Section 404.1520(a) and (b), which provides "If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience."

Plaintiff argues that the ALJ erred in not finding him disabled based on the fact that his impairment was "expected" to last for a continuous period of not less than 12 months. The ALJ, in reviewing plaintiff's work record during the relevant period, did not have to consider prospectively the expectations of the duration of his impairment because the ALJ had the benefit of knowing the actual amounts plaintiff did earn during the period. The ALJ averaged Walton's actual earnings and found that in October, 1995, he earned $523.77, in November, 1995, $640.26, and $1,140.33 in December, 1995. His earnings were consistently in excess of $500 per month beginning in October, 1995. Plaintiff's employment during the relevant period did not fulfill the requirements of being classified as "trial work periods" as defined in Section 404.1592.

The Commissioner's decision is supported by substantial evidence and was based upon a correct application of the law. It should, therefore, be affirmed.

Plaintiff's motion for summary judgment will be denied and defendant's motion for summary judgment will be granted.

An appropriate order shall issue.

/s/ ILLEGIBLE
UNITED STATES MAGISTRATE
JUDGE

Date: April 14, 1999

APPENDIX F

[seal omitted]

SOCIAL SECURITY ADMINISTRATION

Refer to: TAHB9
[Social Security
Number omitted]

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mr. Cleveland B. Walton
5 Shoal Ct.
Portsmouth, VA 23703

Dear Mr. Walton:

The Appeals Council has considered the request for review of the Administrative Law Judge's decision issued on August 15, 1997.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. The regulations also provide that where new and material evidence is submitted with the request for review, the court record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge's actions, findings, or conclusion is contrary to the weight of the evidence currently of record (20 CFR 404.970 and 416.1470).

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Commissioner of Social Security in your case. In reaching this conclusion, the Appeals Council has considered the applicable statutes, regulations, and rulings in effect as of the date of this action.

The Appeals Council has also considered the contentions raised in the material identified on the attached Order of Appeals Council, but concluded that these contentions do not provide a basis for changing the Administrative Law Judge's decision.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Commissioner of Social Security as the defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided for in sections 205(g) and 1631(c)(3) of the Social Security Act, as amended (42 U.S.C. 405(g) and 1383(c)(3)).

If you cannot file your complaint within 60 days, you may ask the Appeals Council to extend the time in which you may begin a civil action. However, the Council will only extend the time if you provide a good reason for not meeting the deadline. Your reason(s) must be set forth clearly in your request.

If a civil action is commenced, the Commissioner must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel, Social Security Administration, Room 611, Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235. (See rules 4(c) and (i) of the Federal Rules of Civil Procedure). In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

original signed by
David O. Phillips
Administrative Appeals Judge

cc:
Kathryn L. Prior

APPENDIX G

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF	**CLAIM FOR**
Cleveland B. Walton (Claimant)	Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
_____ (Wage Earner)	[omitted] (Social Security Number)

PROCEDURAL HISTORY

The claimant filed concurrent applications for a period of disability, disability insurance benefits, and supplemental security income on April 12, 1995, with a protective filing on March 14, 1995. After two administrative denials, the claimant requested a hearing on October 12, 1995. A hearing was held on July 10, 1996, and on August 30, 1996 the undersigned Administrative Law Judge issued a decision finding that the claimant was entitled to a closed period of disability from October 31, 1994 to December 10, 1995 when, according to his testimony at the hearing, he returned to substantial gainful activity.

The Administration subsequently determined that the claimant's earnings beginning in October 1995 exceeded $500 per month (indicating an ability to engage in substantial gainful activity under sections 404.1574 and

416.974 of Regulation Nos. 4 and 16), and on March 12, 1997 the Appeals Council remanded the case to the undersigned to determine whether the claimant is, in fact, entitled to a cash benefit.

At both the original hearing and the supplemental hearing held in Richmond, Virginia, on June 3, 1997, the claimant was represented by Kathryn L. Pryor, Attorney at Law.

ISSUES

The general issues are whether the claimant is entitled to a period of disability and disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, as amended; and whether he is disabled under section 1614(a)(3)(A) of the Act.

EVALUATION OF THE EVIDENCE

Sections 404.1505 and 416.905 of the Regulations provide the basic definition of disability—the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted, or can be expected to for a continuance period of not less than 12 months. Thus, the claimant must prove that he has a medically determinable impairment which prevents him from performing substantial gainful activity.

Social Security Ruling 82-52 provides that when an individual returns to work demonstrating the ability to engage in substantial gainful activity before approval of the award and prior to the lapse of the 12-month period after onset, the claim must be denied. While the undersigned concluded in the decision of August 30, 1996 that

Mr. Walton had an impairment meeting the requirements of section 12.03 of Appendix 1 to Subpart P of Regulations No. 4, the duration requirement provides that he must be prevented from performing substantial gainful activity for a 12-month period even if his impairment lasted or was expected to last for 12 months. The undersigned must determine whether the claimant engaged in substantial gainful activity as defined in the Regulations prior to October 31, 1995, 12 months after the alleged onset of disability.

At the initial hearing, the claimant testified that he had begun working as a general laborer and cashier at a grocery in May 1995. He testified that he worked on a part-time basis between May and December 10, 1995, five to six hours a day, three days a week, earning $5.50 an hour. Beginning December 10, 1995, he began working 40 hours a week on a full-time basis, earning $6.50 an hour.

When the Social Security District office began processing the claim for payment of supplemental security income, it obtained pay stubs from the claimant and earnings information directly from the personnel department of the grocery store for which the claimant worked. The records showed that the claimant actually earned $354.39 in June 1995, $519.43 in July 1995, $335.67 in August 1995, $392.94 in September 1995, $523.77 in October 1995, $640.26 in November 1995, and $1,140.33 in December 1995 (Exhibit 40). The Administration maintains that the claimant returned to substantial gainful activity in October 1995, when his earnings consistently were in excess of $500 a month.

Counsel argues that the above-described earnings should be averaged over the entire period of time that

the claimant worked, which would equal $461.07 a month from June through November 1995 and, with actual December 1995 earnings, would increase to an average of $566.68 a month (Exhibit 53).

Sections 404.1574 and 416.974 of the Regulations provide several guidelines to determine whether an individual is engaging in substantial gainful activity. Sections 404.1574(b) and 416.974(b) provide that the criteria in paragraph (a) of those sections, and sections 404.1576 and 416.976 be considered before looking at actual earnings.

Sections 404.1574(a) and 416.974(a) provide that earnings amounts may not necessarily show that an individual has the ability or inability to engage in substantial gainful activity. Only the amounts earned (and no subsidized earnings) will be considered, and work in a sheltered or special environment could be viewed differently than similar work in the civilian work force. The evidence in the case at hand does not show that the claimant's earnings were subsidized, or that he worked in a sheltered or special environment.

Sections 404.1576 and 416.976 provide that impairment related work expenses *may* be deducted from earnings to reduce the monthly wage amount. Included in those sections is payment for certain prescribed drugs and medical services. Counsel has maintained that the claimant's out-of-pocket expenses for high blood pressure medication should be deducted from his total earnings in October 1995. She indicated that his earnings of $523.77 should be offset by a payment of $24.38 for high blood pressure medicine made on October 17, 1995 (Exhibit 44). Sections 404.1576(c)(5) and 416.976(c)(5) provide that if an individual uses drugs or

medical services to control an impairment, the payments for them *may* be deducted. Examples of deductible drugs and medical services listed are anticonvulsant drugs to control epilepsy and anti-depressant medication for mental disorders. While the claimant in this case has a mental disorder and has taken medication for it, that medication was provided for the claimant by a mental health agency and did not represent an out-of-pocket expense. While the claimant apparently requires blood pressure medication, the undersigned finds that that medication would not be considered a deductible drug as intended by the Regulations.

Sections 404.1574 (b) and 416.974 (b) provide monetary guidelines for earnings that will ordinarily show that an individual has engaged in substantial gainful activity. For calendar years after 1989, there is a rebuttable presumption that earnings averaging more than $500 a month will *ordinarily* show that an individual is engaging in substantial gainful activity. As previously noted, the claimant earned $523.77 in October 1995, $640.26 in November 1995, and $2,140.33 in December 1995 (Exhibit 40). Although counsel argues that the entire period (from when the claimant returned to work in May 1995 until he began consistently earning in excess of $500 a month) should be considered when averaging earnings, SSR 83-35 provides that when there is a significant change in work patterns or earnings during the period of work requiring evaluation, earnings are not averaged over the entire period of work involved. It is noted that the claimant testified that he worked on a part-time basis until he was able to return to full-time work despite his impairment. There was a significant change in the claimant's ability to

function and in his earnings (since he consistently earned in excess of $500 a month for months after October 1995 as compared to earnings averaging only $350 from June to September 1995). The undersigned will average earnings after October 1995, and the record clearly demonstrates that the claimant consistently earned in excess of $500 beginning in October 1995.

There was evidence submitted by a former employer indicating that the claimant's performance was not ranked among the top as compared to other employees. As a matter of fact, the claimant ranked last in performance in March 1996 (Exhibit 51). While it is admirable that the claimant has continued to work despite his psychiatric impairment, the undersigned is bound by the law and regulations which indicate that the claimant returned to substantial gainful activity beginning October 1995.

Counsel argued that the claimant should be entitled to a trial work period beginning May 1995, when he returned to part-time work. Sections 404.1592(e) and 416.992(e) provide specifically that a trial work period will begin with the month in which an individual becomes entitled to a *cash benefit.* In this case, since the undersigned must find that the claimant returned to substantial gainful activity beginning in October 1995, he can not be found to be under a "disability" because he was not prevented from working for any continuous period of 12 months. Since he is not under a "disability," he is not entitled to a cash benefit or to a trial work period under the Regulations. The undersigned therefore concludes that the claimant is not entitled to a period of disability, disability insurance

benefits, or supplemental security income based on the applications filed protectively on March 14, 1995.

As previously indicated, the undersigned admires the claimant for his attempts to continue to work despite a Listing-level impairment, and if he should be prevented from engaging in substantial gainful for a period of 12 months or longer in the future, he is encouraged to file new applications for benefits.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following finding:

1. The claimant met the earnings requirements of the Social Security Act on October 31, 1994, the date that he alleges he became disabled, and continues to meet them through December 31, 2000.

2. The claimant began working with earnings averaging in excess of $500 a month in October 1995.

3. The claimant's work activity involved significant activities for pay, and constitutes substantial gainful activity within the meaning of the Regulations.

4. The claimant has not been unable to engage in substantial gainful activity for any continuous period of at least 12 months.

5. The claimant was not under a "disability" as defined in the Social Security Act at any time through the date of this decision.

DECISION

It is the decision of the Administrative Law Judge that, based on the applications filed protectively on March 14, 1995, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Securi y Act, and is not eligible for supplemental security income under sections 1602 and 1614(a)(3)(A) of the Act.

/s/ DAVID S. ANTROBUS
DAVID S. ANTROBUS
Administrative Law Judge
Main Street Centre, Rm 1720
600 East Main Street
Richmond, VA 23219-2406

AUG 15, 1997
Date

APPENDIX H

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

ORDER OF APPEALS COUNCIL

REMANDING CASE TO ADMINISTRATIVE LAW JUDGE

In the case of	**Claim for**
	Period of Disability
Cleveland B. Walton	Disability Insurance Benefits
(Claimant)	
_____	[omitted]
(Wage Earner)(Leave blank if same as above)	(Social Security Number)

Notice of own motion review was previously sent on December 11, 1996, advising of the Appeals Council's intention to review the Administrative Law Judge's decision issued on August 30, 1996, pursuant to 20 CFR 404.969, because there was an error of law and the action, findings or conclusions were not supported by substantial evidence (20 CFR 404.970). In that notice the Council also advised of its intention to remand this case for further proceedings and offered an opportunity for comment on that proposed action. Comments were received and were considered.

Under the authority of 20 CFR 404.977, the Appeals Council vacates the hearing decision and remands this case to an Administrative Law Judge for resolution of the following issue:

- The Administrative Law Judge found that the claimant was disabled beginning October 31,

1994 and that his disability benefits ceased on December 19, 1995, when he returned to full-time employment; however, the additional evidence suggests that the claimant returned to work demonstrating ability to engage in substantial gainful activity which occurred before the approval of the award and prior to the lapse of the 12-month period after onset. If this is so, in accordance with Social Security Ruling 82-52, the claimant's claim must be denied. A further evaluation of the claimant's work activity since October 31, 1994 is warranted.

Upon remand, the Administrative Law Judge will:

- Further consider the issues in this case, including the information regarding the claimant's work activity and evaluate his work activity since the established onset date of October 31, 1994.

In compliance with the above, the Administrative Law Judge will offer the claimant an opportunity for a hearing, take any further action needed to complete the administrative record and issue a new decision.

Section 8001 of Public Law 100-647 requires payment of interim benefits in cases where an Administrative Law Judge issues a favorable disability decision and no final decision is issued within 110 days after the date of the Administrative Law Judge's decision. Because the Appeals Council has exercised its own motion review authority in this case, interim benefits may be payable if a final decision is not issued within 110 days after the date of the Administrative Law Judge's decision. Those interim benefits will continue until a final decision is issued. Another Social Security Administration office will notify the claimant at the appropriate time as to the amount and the effective date of any interim payments.

APPEALS COUNCIL

/s/ DAVID O. PHILLIPS
DAVID O. PHILLIPS
Administrative Appeals Judge

/s/ RICHARD F. WHITE
RICHARD F. WHITE
Administrative Appeals Judge

Date: MAR. 4, 1997

APPENDIX I

[seal omitted]

SOCIAL SECURITY ADMINISTRATION

Refer to: TAHB9
[Social Security
Number omitted]

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

Mr. Cleveland B. Walton
13606 Lucky Debonaire Ln.
Midlothian, VA 23112

NOTICE OF ORDER OF APPEALS COUNCIL REMANDING CASE TO ADMINISTRATIVE LAW JUDGE

What This Order Means

We have sent your case back to an Administrative Law Judge. In the enclosed order, we explain why we did this and what actions the Administrative Law Judge will take on your claim.

In addition to what we directed the Administrative Law Judge to do, the Administrative Law Judge may also take any other action necessary to complete your claim.

The Next Action on Your Claim

An Administrative Law Judge will contact you to tell you what you need to do.

If you have any questions you may contact your local hearing office.

This notice and enclosed order of remand mailed MAR. 4, 1997

cc:
Kathryn L. Pryor, Esq.
RCALJ, Philadelphia

Kathryn L. Pryor, Esq.
P.O. Box 12206
Richmond, VA 23241

APPENDIX J

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF	**CLAIM FOR**
Cleveland B. Walton (Claimant)	Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
_____ (Wage Earner)	[omitted] (Social Security Number)

PROCEDURAL HISTORY

Cleveland B. Walton filed applications for disability insurance benefits and supplementary security income on March 14, 1995. They were denied initially on May 18, 1995, and upon reconsideration on August 16, 1995. He filed a timely request for hearing on October 12, 1995, and this case is now properly before this Administrative Law Judge for a decision pursuant to sections 404.930 and 416.1430 of Regulations Nos. 4 and 16. Mr. Walton meets the special earnings requirements for disability insured status under the Social Security Act through December 31, 1999.

At a hearing before this Administrative Law Judge on July 10, 1996 in Richmond, Virginia, Mr. Walton was represented by Attorney Kathryn L. Pryor. Also present and testifying were the claimant's mother, Joyce Walton, and vocational expert Dr. Andrew V. Beale.

Mr. Walton initially alleged disability commencing February 29, 1995, but at his hearing he amended that onset date to October 31, 1994, the date on which he was fired from a job as a substitute teacher (Exhibit 34).

ISSUES

The general issues are whether the claimant is entitled to a period of disability and disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, as amended; and whether he is disabled under section 1614(a)(3)(A) of the Act. The Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairments which can be expected to either result in death or last for a period of not less than 12 months.

EVALUATION OF THE EVIDENCE

The claimant alleges disability since his amended onset date of October 31, 1994 due to psychiatric impairments, i.e., a schizophrenic disorder with associated depression. Subsequent to the alleged onset date, he worked briefly in November of 1994 as a suit salesman and processor in department and clothing stores, and in December of 1994 as a grocery store stocker. He also work briefly in February of 1994 as a night stocker for a grocery store (Exhibit 14). These episodes of employment reportedly ended due to his psychiatric impairments and as such, it is concluded by this Administrative Law Judge that they constituted unsuccessful work attempts.

It was further determined at the claimant's hearing that since May of 1995, he [h]as been employed at a grocery store as a general worker and cashier. He ini-

tially was employed on a part time basis between May and December 10, 1995, working five to six hours a day, three days a week, earning $5.50 per hour. Beginning December 10, 1995, he began working 40 hours per week on a full-time basis, earning $6.50 per hour. Earnings prior to December 10, 1995 averaged $396 per month. Since these earnings averaged less than $500 per month, he was not engaged in substantial gainful activity. However, beginning December 10, 1995 when he began working full time, his earnings have averaged $1,040 per month, clearly reflecting substantial gainful activity. Other than being placed on a night shift, he advised he received no special considerations in this job. The undersigned therefore concludes, based upon all above-described information, that the claimant was not engaged in substantial gainful activity from October 31, 1994 to December 10, 1995, but was engaged in substantial gainful activity subsequent to that date.

The claimant remarked that he works on the night shift for this grocery store because he did not "scan" fast enough as a checker or scanner. He indicated for the record that [ ] since being hospitalized for paranoid schizophrenia, he has had difficulty focusing on job duties. He undergoes outpatient psychiatric care and takes the medications Haldol, Cogentin, Ativan, and Calan.

He relies upon his mother to give him these medications. He is able to prepare simple meals for himself, care for his personal needs, and perform simple household chores. He requires assistance with handling his finances. He has few social activities or interactions other than attending church where he plays music. He has limited interaction with people other than family

members. He reported medication side effects of an occasional dry mouth, weight gain, and arm tremor (Exhibits 15 and 16). The claimant's mother, Joyce Walton, generally corroborated these statements. She noted that he has required hospitalizations for his psychiatric impairments and that since his last [ ] hospitalization she brought him home to live with her in Richmond. She noted that she must remind him to take his medication and she wakes him up to go to work. She was not sure he could live independently since he depends so much on her presently. These remarks were consistent with her statements in Exhibit 17.

The undersigned evaluated this testimony pursuant to [ ] 20 CFR sections 404.1529, 416.929, 404.1569a and 416.969a (SSR 96-7p), and found it to be fully credible and consistent with written statements for the record describing the claimant's impairment and restrictions.

Medical records in this case document the claimant's history of psychiatric treatment dating from 1990, when he was hospitalized in October of that year for major depression with psychotic features characterized by hallucinations, agitation, and difficulty eating and sleeping (Exhibit 18). He reportedly was treated on an outpatient basis and taking Haldol but experienced a deterioration warranting hospitalization on May 22, 1994. At that time he had become anxious and depressed about losing his job. He then became suspicious and paranoid and for several days was mute most of the time. He exhibited difficulty thinking and remembering, and his cognitive style was marked by obsessive-ness and rumination. Major depression with melancholia and psychotic features was again diagnosed (Exhibits 19 and 20). Further deterioration of his

condition occurred in March of 1995, at which time he was experiencing visual hallucinations, anxiety and agitation (Exhibit 21). Paranoid schizophrenia was diagnosed and he was hospitalized from March 5 to March 11, 1995. During this admission he exhibited evidence of catatonic schizophrenia. His condition gradually stabilized with prescribed medications. He was discharged to be followed on an outpatient basis (Exhibits 22 and 23).

The record confirms that Mr. Walton is under the outpatient psychiatric care with Dr. R. Neil Johnston. His records note ongoing prescription of medications, but that the claimant is generally isolated with activities confined to his home. He exhibits a flattened affect. It was noted that he had been dismissed from eight jobs in a year due to a decline in his productivity level, concentration problems, and difficulty following instructions (Exhibits 24-27). Dr. William A. Shepard, another treating psychiatrist, obeserved [*sic*] that even with medication management, the claimant carries out reasonable conversation and duties on only a minimal scale. His isolation and paranoia have decreased his cognitive abilities and social boundaries. He opined that the claimant lacked the ability to understand, remember and carry out complex job instructions and that he had only a fair ability to handle simpler instructions (Exhibit 28).

The medical evidence in this case was transmitted to board-certified psychiatrist and medical expert Dr. Elliot J. Spanier with the request that he review the evidence and respond to interrogatories posed by this Administrative Law Judge (Exhibit 31). Dr. Speanier [*sic*] advised in Exhibit 33 that the claimant clearly had

a schizophrenic disorder meeting the requirements of section 12.03 of Appendix 1 of Subpart P of Regulation No. 4. He noted that the record revealed objective signs of schizophrenia meeting the "A" criteria of that section: delusions and hallucinations, catatonic behavior, incoherence, loosening of associations and illogical thinking with a flattened affect, and emotional withdrawal and isolation. In addition, he observed that the claimant had significant functional limitations (the "B" criteria of section 12.03). Specifically, the record demonstrates a moderate restriction of activities [o]f daily living given his reliance upon his mother to assist with a good deal of the household structure, marked difficulty mai[n]taining social functioning given his isolation and withdrawal, constant deficiencies of concentration, and continual episodes of deterioration in a work setting demonstrated by his multiple job losses. The undersigned further reviewed the record and noted that the claimant has a condition meeting section 12.03 in that he has a medically documented history of one or more episodes of acute symptoms and signs of paranoid schizophrenia although they are currently attenuated by medication or psychosocial support. He has demonstrated repeated episodes of deterioration in work settings causing him to withdraw from the situation or to experience an excerbation of his symptoms, and has a documented history of the inability to function outside of a highly supportive living situation, which is reflected in his current situation in which he lives with his mother.

Since the record in this case clearly establishes an impairment meeting the requirements of section 12.03A, B, and C, the undersigned concludes that Mr. Walton was "disabled" commencing October 31, 1994.

However, as noted previously herein, he returned to full time employment on December 10, 1995 and has engaged in substantial gainful activity demonstrated by earnings averaging $1,040 per month. While counsel for the claimant argued that the award of a trial work period is warranted in this case, (i.e., an opportunity to work an additional nine months and receive benefits during those months), the undersigned does not concur. Mr. Walton has demonstrated a capacity for sustained work since at least May of 1995 in view of his part time work activity. Even though that was not substantial gainful activity in terms of his earnings, that continuous employment since May of 1995 through the present date persuades the undersigned that an additional trial period is unnecessary. The claimant has clearly established an ability to return to full time employment despite his psychiatric impairment.

Accordingly, Mr. Walton is entitled [ ] to [a] period of disability commencing October 31, 1994, and to disability insurance benefits and supplementary security income pursuant to the applications filed protectively on March 14, 1995. It is further concluded that since his disability ceased on December 10, 1995 due to his return to substantial gainful activity, his entitlement to benefits ended February 29, 1996, the second month after the month in which his disability ceased.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the disability insured status requirements of the Act on October 31, 1994, the date the claimant stated he became unable to work, and continues to meet them through December 31, 1999.

2. The claimant was not engaged in substantial gainful activity from October 31, 1994 until his return to full time employment on December 10, 1995, earning an average of $1,040 per month since that date.

3. The medical evidence establishes that the claimant has severe paranoid schizophrenia with underlying depression and anxiety.

4. The severity of the claimant's impairment meets the requirements of section 12.03A, B, and C, Appendix 1, Subpart P, Regulations No. 4 and has precluded him from working for at least 12 continuous months.

5. The claimant was under a "disability," as defined in the Social Security Act, beginning October 31, 1994 (20 CPR 404.1520(d) and 416.920(d)).

6. Beginning December 10, 1995, the claimant returned to work as a general worker and cashier for a grocery store, working 40 hours per week, earning an average of $6.50 per hour or $1,040 per month.

7. The claimant's work activity involves significant physical or mental activities for pay or profit and constitutes substantial gainful activity within the meaning of the regulations (20 CFR 44.532 and 416.972).

8. In view of his return to substantial gainful activity, the claimant's disability ceased on December 10, 1995.

9. In view of the claimant's part-time and full-time work since May of 1995, the further award of a trial work period is not warranted.

DECISION

It is the decision of the Administrative Law judge that, based on the application filed on March 14, 1995, the claimant is entitled to a period of disability commencing on October 31, 1994 and to disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

It is the further decision of the Administrative Law Judge that, based on the application filed on March 14, 1995, the claimant has been disabled since October 31, 1994 under 1614(a)(3)(A) of the Social Security Act.

It is the further decision of the Administrative Law Judge that based on the finding that disability ceased on December 10, 1995, entitlement to a period of disability and disability insurance benefits, and eligibility for supplemental security income, ended effective February 29, 1996, the end of the second calendar month after the month in which the disability ceased.

The component of the Social Security Administration responsible for authorizing supplemental security income payments will advise the claimant regarding the nondisability requirements for these payments, and if eligible, the amount and the month(s) for which payment will be made.

/s/ DAVID S. ANTROBUS
DAVID S. ANTROBUS
Administrative Law Judge
Main Street Centre, Rm 1720
600 East Main Street
Richmond, VA 23219-2406

AUG. 30, 1996
Date

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CLEVELAND B. WALTON, PLAINTIFF-APPELLANT

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT-APPELLEE

FILED: February 27, 2001

On Petition for Rehearing and Rehearing En Banc

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ PATRICIA S. CONNOR
CLERK

APPENDIX L

1. 42 U.S.C. 422(c) states as follows:

(c) "Period of trial work" defined

(1) The term "period of trial work", with respect to an individual entitled to benefits under section 423, 402(d), 402(e), or 402(f) of this title, means a period of months beginning and ending as provided in paragraphs (3) and (4).

(2) For purposes of sections 416(i) and 423 of this title, any services rendered by an individual during a period of trial work shall be deemed not to have been rendered by such individual in determining whether his disability has ceased in a month during such period. For purposes of this subsection the term "services" means activity (whether legal or illegal) which is performed for remuneration or gain or is determined by the Commissioner of Social Security to be of a type normally performed for remuneration or gain.

(3) A period of trial work for any individual shall begin with the month in which he becomes entitled to disability insurance benefits, or, in the case of an individual entitled to benefits under section 402(d) of this title who has attained the age of eighteen, with the month in which he becomes entitled to such benefits or the month in which he attains the age of eighteen, whichever is later, or, in the case of an individual entitled to widow's or widower's insurance benefits under section 402(e) or (f) of this title who became entitled to such benefits prior to attaining age 60, with the month in which such individual becomes so entitled. Notwithstanding the preceding sentence, no period of trial work

may begin for any individual prior to the beginning of the month following September 1960; and no such period may begin for an individual in a period of disability of such individual in which he had a previous period of trial work.

(4) A period of trial work for any individual shall end with the close of whichever of the following months is the earlier:

(A) the ninth month, in any period of 60 consecutive months, in which the individual renders services (whether or not such nine months are consecutive); or

(B) the month in which his disability (as defined in section 423(d) of this title) ceases (as determined after application of paragraph (2) of this subsection).

2. 42 U.S.C. 423 states as follows:

§ 423. Disability insurance benefit payments

(a) Disability insurance benefits

(1) Every individual who—

(A) is insured for disability insurance benefits (as determined under subsection (c)(1) of this section),

(B) has not attained retirement age (as defined in section 416(*l*) of this title),

(C) has filed application for disability insurance benefits, and

(D) is under a disability (as defined in subsection (d) of this section)

shall be entitled to a disability insurance benefit (i) for each month beginning with the first month after his waiting period (as defined in subsection (c)(2) of this section) in which he becomes so entitled to such insurance benefits, or (ii) for each month beginning with the first month during all of which he is under a disability and in which he becomes so entitled to such insurance benefits, but only if he was entitled to disability insurance benefits which terminated, or had a period of disability (as defined in section 416(i) of this title) which ceased, within the 60-month period preceding the first month in which he is under such disability, and ending with the month preceding whichever of the following months is the earliest: the month in which he dies, the month in which he attains retirement age (as defined in section 416(*l*) of this title), or, subject to subsection (e) of this section, the termination month. For purposes of the preceding sentence, the termination month for any individual shall be the third month following the month in which his disability ceases; except that, in the case of an individual who has a period of trial work which ends as determined by application of section 422(c)(4)(A) of this title, the termination month shall be the earlier of (I) the third month following the earliest month after the end of such period of trial work with respect to which such individual is determined to no longer be suffering from a disabling physical or mental impairment, or (II) the third month following the earliest month in which such individual engages or is determined able to engage in substantial gainful activity, but in no event earlier than the first month occurring after the 36 months following

such period of trial work in which he engages or is determined able to engage in substantial gainful activity. No payment under this paragraph may be made to an individual who would not meet the definition of disability in subsection (d) of this section except for paragraph (1)(B) thereof for any month in which he engages in substantial gainful activity, and no payment may be made for such month under subsection (b), (c), or (d) of section 402 of this title to any person on the basis of the wages and self-employment income of such individual. In the case of a deceased individual, the requirement of subparagraph (C) may be satisfied by an application for benefits filed with respect to such individual within 3 months after the month in which he died.

(2) Except as provided in section 402(q) of this title and section 415(b)(2)(A)(ii) of this title, such individual's disability insurance benefit for any month shall be equal to his primary insurance amount for such month determined under section 415 of this title as though he had attained age 62 in—

(A) the first month of his waiting period, or

(B) in any case in which clause (ii) of paragraph (1) of this subsection is applicable, the first month for which he becomes entitled to such disability insurance benefits,

and as though he had become entitled to old-age insurance benefits in the month in which the application for disability insurance benefits was filed and he was entitled to an old-age insurance benefit for each month for which (pursuant to subsection (b) of this section) he was entitled to a disability insurance benefit. For the

purposes of the preceding sentence, in the case of an individual who attained age 62 in or before the first month referred to in subparagraph (A) or (B) of such sentence, as the case may be, the elapsed years referred to in section 415(b)(3) of this title shall not include the year in which he attained age 62, or any year thereafter.

(b) Filing application

An application for disability insurance benefits filed before the first month in which the applicant satisfies the requirements for such benefits (as prescribed in subsection (a)(1) of this section) shall be deemed a valid application (and shall be deemed to have been filed in such first month) only if the applicant satisfies the requirements for such benefits before the Commissioner of Social Security makes a final decision on the application and no request under section 405(b) of this title for notice and opportunity for a hearing thereon is made, or if such a request is made, before a decision based upon the evidence adduced at the hearing is made (regardless of whether such decision becomes the final decision of the Commissioner of Social Security). An individual who would have been entitled to a disability insurance benefit for any month had he filed application therefor before the end of such month shall be entitled to such benefit for such month if such application is filed before the end of the 12th month immediately succeeding such month.

(c) Definitions; insured status; waiting period

For purposes of this section—

(1) An individual shall be insured for disability insurance benefits in any month if—

(A) he would have been a fully insured individual (as defined in section 414 of this title) had he attained age 62 and filed application for benefits under section 402(a) of this title on the first day of such month, and

(B)(i) he had not less than 20 quarters of coverage during the 40-quarter period which ends with the quarter in which such month occurred, or

(ii) if such month ends before the quarter in which he attains (or would attain) age 31, not less than one-half (and not less than 6) of the quarters during the period ending with the quarter in which such month occurred and beginning after he attained the age of 21 were quarters of coverage, or (if the number of quarters in such period is less than 12) not less than 6 of the quarters in the 12-quarter period ending with such quarter were quarters of coverage, or

(iii) in the case of an individual (not otherwise insured under clause (i)) who, by reason of section 416(i)(3)(B)(ii) of this title, had a prior period of disability that began during a period before the quarter in which he or she attained age 31, not less than one-half of the quarters beginning after such individual attained age 21 and ending with the quarter in which such month occurs are quarters of coverage, or (if the number of quarters in such period is less than 12) not less than 6 of the quarters in the 12-quarter period ending with such quarter are quarters of coverage;

except that the provisions of subparagraph (B) of this paragraph shall not apply in the case of an individual who is blind (within the meaning of "blindness" as defined in section 416(i)(1) of this title). For purposes of subparagraph (B) of this paragraph, when the number of quarters in any period is an odd number, such number shall be reduced by one, and a quarter shall not be counted as part of any period if any part of such quarter was included in a period of disability unless such quarter was a quarter of coverage.

(2) The term "waiting period" means, in the case of any application for disability insurance benefits, the earliest period of five consecutive calendar months—

(A) throughout which the individual with respect to whom such application is filed has been under a disability, and

(B)(i) which begins not earlier than with the first day of the seventeenth month before the month in which such application is filed if such individual is insured for disability insurance benefits in such seventeenth month, or (ii) if he is not so insured in such month, which begins not earlier than with the first day of the first month after such seventeenth month in which he is so insured.

Notwithstanding the preceding provisions of this paragraph, no waiting period may begin for any individual before January 1, 1957.

(d) "Disability" defined

(1) The term "disability" means—

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or

(B) in the case of an individual who has attained the age of 55 and is blind (within the meaning of "blindness" as defined in section 416(i)(1) of this title), inability by reason of such blindness to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time.

(2) For purposes of paragraph (1)(A)—

(A) An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

(B) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Commissioner of Social Security shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Commissioner of Social Security does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

(C) An individual shall not be considered to be disabled for purposes of this subchapter if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled.

(3) For purposes of this subsection, a "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

(4)(A) The Commissioner of Social Security shall by regulations prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity. No individual who is blind shall be regarded as having demonstrated an ability to engage in substantial gainful activity on the basis of earnings that do not exceed an amount equal to the exempt amount which would be applicable under section 403(f)(8) of this title, to individuals described in

subparagraph (D) thereof, if section 102 of the Senior Citizens' Right to Work Act of 1996 had not been enacted. Notwithstanding the provisions of paragraph (2), an individual whose services or earnings meet such criteria shall, except for purposes of section 422(c) of this title, be found not to be disabled. In determining whether an individual is able to engage in substantial gainful activity by reason of his earnings, where his disability is sufficiently severe to result in a functional limitation requiring assistance in order for him to work, there shall be excluded from such earnings an amount equal to the cost (to such individual) of any attendant care services, medical devices, equipment, prostheses, and similar items and services (not including routine drugs or routine medical services unless such drugs or services are necessary for the control of the disabling condition) which are necessary (as determined by the Commissioner of Social Security in regulations) for that purpose, whether or not such assistance is also needed to enable him to carry out his normal daily functions; except that the amounts to be excluded shall be subject to such reasonable limits as the Commissioner of Social Security may prescribe.

(B) In determining under subparagraph (A) when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity, the Commissioner of Social Security shall apply the criteria described in subparagraph (A) with respect to services performed by any individual without regard to the legality of such services.

(5)(A) An individual shall not be considered to be under a disability unless he furnishes such medical and

other evidence of the existence thereof as the Commissioner of Social Security may require. An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability. Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability. Any non-Federal hospital, clinic, laboratory, or other provider of medical services, or physician not in the employ of the Federal Government, which supplies medical evidence required and requested by the Commissioner of Social Security under this paragraph shall be entitled to payment from the Commissioner of Social Security for the reasonable cost of providing such evidence.

(B) In making any determination with respect to whether an individual is under a disability or continues to be under a disability, the Commissioner of Social Security shall consider all evidence available in such

individual's case record, and shall develop a complete medical history of at least the preceding twelve months for any case in which a determination is made that the individual is not under a disability. In making any determination the Commissioner of Social Security shall make every reasonable effort to obtain from the individual's treating physician (or other treating health care provider) all medical evidence, including diagnostic tests, necessary in order to properly make such determination, prior to evaluating medical evidence obtained from any other source on a consultative basis.

(6)(A) Notwithstanding any other provision of this subchapter, any physical or mental impairment which arises in connection with the commission by an individual (after October 19, 1980) of an offense which constitutes a felony under applicable law and for which such individual is subsequently convicted, or which is aggravated in connection with such an offense (but only to the extent so aggravated), shall not be considered in determining whether an individual is under a disability.

(B) Notwithstanding any other provision of this subchapter, any physical or mental impairment which arises in connection with an individual's confinement in a jail, prison, or other penal institution or correctional facility pursuant to such individual's conviction of an offense (committed after October 19, 1980) constituting a felony under applicable law, or which is aggravated in connection with such a confinement (but only to the extent so aggravated), shall not be considered in determining whether such individual is under a disability for purposes of benefits payable for any month during which such individual is so confined.

(e) Engaging in substantial gainful activity

(1) No benefit shall be payable under subsection (d)(1)(B)(ii), (d)(6)(A)(ii), (d)(6)(B), (e)(1)(B)(ii), or (f)(1)(B)(ii) of section 402 of this title or under subsection (a)(1) of this section to an individual for any month, after the third month, in which he engages in substantial gainful activity during the 36-month period following the end of his trial work period determined by application of section 422(c)(4)(A) of this title.

(2) No benefit shall be payable under section 402 of this title on the basis of the wages and self-employment income of an individual entitled to a benefit under subsection (a)(1) of this section for any month for which the benefit of such individual under subsection (a)(1) of this section is not payable under paragraph (1).

(f) Standard of review for termination of disability benefits

A recipient of benefits under this subchapter or subchapter XVIII of this chapter based on the disability of any individual may be determined not to be entitled to such benefits on the basis of a finding that the physical or mental impairment on the basis of which such benefits are provided has ceased, does not exist, or is not disabling only if such finding is supported by—

(1) substantial evidence which demonstrates that—

(A) there has been any medical improvement in the individual's impairment or combination of impairments (other than medical improvement which is not related to the individual's ability to work), and

(B) the individual is now able to engage in substantial gainful activity; or

(2) substantial evidence which—

(A) consists of new medical evidence and a new assessment of the individual's residual functional capacity, and demonstrates that—

(i) although the individual has not improved medically, he or she is nonetheless a beneficiary of advances in medical or vocational therapy or technology (related to the individual's ability to work), and

(ii) the individual is now able to engage in substantial gainful activity, or

(B) demonstrates that—

(i) although the individual has not improved medically, he or she has undergone vocational therapy (related to the individual's ability to work), and

(ii) the individual is now able to engage in substantial gainful activity; or

(3) substantial evidence which demonstrates that, as determined on the basis of new or improved diagnostic techniques or evaluations, the individual's impairment or combination of impairments is not as disabling as it was considered to be at the time of the most recent prior decision that he or she was under a disability or continued to be under a disability, and that therefore the individual is able to engage in substantial gainful activity; or

(4) substantial evidence (which may be evidence on the record at the time any prior determination of the

entitlement to benefits based on disability was made, or newly obtained evidence which relates to that determination) which demonstrates that a prior determination was in error.

Nothing in this subsection shall be construed to require a determination that a recipient of benefits under this subchapter or subchapter XVIII of this chapter based on an individual's disability is entitled to such benefits if the prior determination was fraudulently obtained or if the individual is engaged in substantial gainful activity, cannot be located, or fails, without good cause, to cooperate in a review of the entitlement to such benefits or to follow prescribed treatment which would be expected to restore his or her ability to engage in substantial gainful activity. In making for purposes of the preceding sentence any determination relating to fraudulent behavior by any individual or failure by any individual without good cause to cooperate or to take any required action, the Commissioner of Social Security shall specifically take into account any physical, mental, educational, or linguistic limitation such individual may have (including any lack of facility with the English language). Any determination under this section shall be made on the basis of all the evidence available in the individual's case file, including new evidence concerning the individual's prior or current condition which is presented by the individual or secured by the Commissioner of Social Security. Any determination made under this section shall be made on the basis of the weight of the evidence and on a neutral basis with regard to the individual's condition, without any initial inference as to the presence or absence of disability being drawn from the fact that the individual has previously been determined to be

disabled. For purposes of this subsection, a benefit under this subchapter is based on an individual's disability if it is a disability insurance benefit, a child's, widow's, or widower's insurance benefit based on disability, or a mother's or father's insurance benefit based on the disability of the mother's or father's child who has attained age 16.

(g) Continued payment of disability benefits during appeal

(1) In any case where—

(A) an individual is a recipient of disability insurance benefits, or of child's, widow's, or widower's insurance benefits based on disability,

(B) the physical or mental impairment on the basis of which such benefits are payable is found to have ceased, not to have existed, or to no longer be disabling, and as a consequence such individual is determined not to be entitled to such benefits, and

(C) a timely request for a hearing under section 421(d) of this title, or for an administrative review prior to such hearing, is pending with respect to the determination that he is not so entitled,

such individual may elect (in such manner and form and within such time as the Commissioner of Social Security shall by regulations prescribe) to have the payment of such benefits, the payment of any other benefits under this subchapter based on such individual's wages and self-employment income, the payment of mother's or father's insurance benefits to such individual's mother or father based on the disability of such individual as a

child who has attained age 16, and the payment of benefits under subchapter XVIII of this chapter based on such individual's disability, continued for an additional period beginning with the first month beginning after January 12, 1983, for which (under such determination) such benefits are no longer otherwise payable, and ending with the earlier of (i) the month preceding the month in which a decision is made after such a hearing, or (ii) the month preceding the month in which no such request for a hearing or an administrative review is pending.

(2)(A) If an individual elects to have the payment of his benefits continued for an additional period under paragraph (1), and the final decision of the Commissioner of Social Security affirms the determination that he is not entitled to such benefits, any benefits paid under this subchapter pursuant to such election (for months in such additional period) shall be considered overpayments for all purposes of this subchapter, except as otherwise provided in subparagraph (B).

(B) If the Commissioner of Social Security determines that the individual's appeal of his termination of benefits was made in good faith, all of the benefits paid pursuant to such individual's election under paragraph (1) shall be subject to waiver consideration under the provisions of section 404 of this title. In making for purposes of this subparagraph any determination of whether any individual's appeal is made in good faith, the Commissioner of Social Security shall specifically take into account any physical, mental, educational, or linguistic limitation such individual may have (including any lack of facility with the English language).

(h) Interim benefits in cases of delayed final decisions

(1) In any case in which an administrative law judge has determined after a hearing as provided under section 405(b) of this title that an individual is entitled to disability insurance benefits or child's, widow's, or widower's insurance benefits based on disability and the Commissioner of Social Security has not issued the Commissioner's final decision in such case within 110 days after the date of the administrative law judge's determination, such benefits shall be currently paid for the months during the period beginning with the month preceding the month in which such 110-day period expires and ending with the month preceding the month in which such final decision is issued.

(2) For purposes of paragraph (1), in determining whether the 110-day period referred to in paragraph (1) has elapsed, any period of time for which the action or inaction of such individual or such individual's representative without good cause results in the delay in the issuance of the Commissioner's final decision shall not be taken into account to the extent that such period of time exceeds 20 calendar days.

(3) Any benefits currently paid under this subchapter pursuant to this subsection (for the months described in paragraph (1)) shall not be considered overpayments for any purpose of this subchapter (unless payment of such benefits was fraudulently obtained), and such benefits shall not be treated as past-due benefits for purposes of section 406(b)(1) of this title.

(i) Reinstatement of entitlement[*]

(1)(A) Entitlement to benefits described in subparagraph (B)(i)(I) shall be reinstated in any case where the Commissioner determines that an individual described in subparagraph (B) has filed a request for reinstatement meeting the requirements of paragraph (2)(A) during the period prescribed in subparagraph (C). Reinstatement of such entitlement shall be in accordance with the terms of this subsection.

(B) An individual is described in this subparagraph if

(i) prior to the month in which the individual files a request for reinstatement—

(I) the individual was entitled to benefits under this section or section 402 of this title on the basis of disability pursuant to an application filed therefor; and

(II) such entitlement terminated due to the performance of substantial gainful activity;

(ii) the individual is under a disability and the physical or mental impairment that is the basis for the finding of disability is the same as (or related to) the physical or mental impairment that was the basis for the finding of disability that gave rise to the entitlement described in clause (i); and

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[*] This subsection was added December 17, 1999, by Pub. L. No. 106-170, Title I, § 112(a), (c), 113 Stat. 1881, 1886, and became effective on January 1, 2001.

(iii) the individual's disability renders the individual unable to perform substantial gainful activity.

(C)(i) Except as provided in clause (ii), the period prescribed in this subparagraph with respect to an individual is 60 consecutive months beginning with the month following the most recent month for which the individual was entitled to a benefit described in subparagraph (B)(i)(I) prior to the entitlement termination described in subparagraph (B)(i)(II).

(ii) In the case of an individual who fails to file a reinstatement request within the period prescribed in clause (i), the Commissioner may extend the period if the Commissioner determines that the individual had good cause for the failure to so file.

(2)(A)(i) A request for reinstatement shall be filed in such form, and containing such information, as the Commissioner may prescribe.

(ii) A request for reinstatement shall include express declarations by the individual that the individual meets the requirements specified in clauses (ii) and (iii) of paragraph (1)(B).

(B) A request for reinstatement filed in accordance with subparagraph (A) may constitute an application for benefits in the case of any individual who the Commissioner determines is not entitled to reinstated benefits under this subsection.

(3) In determining whether an individual meets the requirements of paragraph (1)(B)(ii), the provisions of subsection (f) shall apply.

(4)(A)(i) Subject to clause (ii), entitlement to benefits reinstated under this subsection shall commence with the benefit payable for the month in which a request for reinstatement is filed.

(ii) An individual whose entitlement to a benefit for any month would have been reinstated under this subsection had the individual filed a request for reinstatement before the end of such month shall be entitled to such benefit for such month if such request for reinstatement is filed before the end of the twelfth month immediately succeeding such month.

(B)(i) Subject to clauses (ii) and (iii), the amount of the benefit payable for any month pursuant to the reinstatement of entitlement under this subsection shall be determined in accordance with the provisions of this title.

(ii) For purposes of computing the primary insurance amount of an individual whose entitlement to benefits under this section is reinstated under this subsection, the date of onset of the individual's disability shall be the date of onset used in determining the individual's most recent period of disability arising in connection with such benefits payable on the basis of an application.

(iii) Benefits under this section or section 202 payable for any month pursuant to a request for reinstatement filed in accordance with paragraph (2) shall be reduced by the amount of any provisional benefit paid to such individual for such month under paragraph (7).

(C) No benefit shall be payable pursuant to an entitlement reinstated under this subsection to an individual for any month in which the individual engages in substantial gainful activity.

(D) The entitlement of any individual that is reinstated under this subsection shall end with the benefits payable for the month preceding whichever of the following months is the earliest:

(i) The month in which the individual dies.

(ii) The month in which the individual attains retirement age.

(iii) The third month following the month in which the individual's disability ceases.

(5) Whenever an individual's entitlement to benefits under this section is reinstated under this subsection, entitlement to benefits payable on the basis of such individual's wages and self-employment income may be reinstated with respect to any person previously entitled to such benefits on the basis of an application if the Commissioner determines that such person satisfies all the requirements for entitlement to such benefits except requirements related to the filing of an application. The provisions of paragraph (4) shall apply to the reinstated entitlement of any such person to the same extent that they apply to the reinstated entitlement of such individual.

(6) An individual to whom benefits are payable under this section or section 402 of this title pursuant to a reinstatement of entitlement under this subsection for 24 months (whether or not consecutive) shall, with

respect to benefits so payable after such twenty-fourth month, be deemed for purposes of paragraph (1)(B)(i)(I) and the determination, if appropriate, of the termination month in accordance with subsection (a)(1) of this section, or subsection (d)(1), (e)(1), or (f)(1) of section 402 of this title, to be entitled to such benefits on the basis of an application filed therefor.

(7)(A) An individual described in paragraph (1)(B) who files a request for reinstatement in accordance with the provisions of paragraph (2)(A) shall be entitled to provisional benefits payable in accordance with this paragraph, unless the Commissioner determines that the individual does not meet the requirements of paragraph (1)(B)(i) or that the individual's declaration under paragraph (2)(A)(ii) is false. Any such determination by the Commissioner shall be final and not subject to review under subsection (b) or (g) of section 405 of this title.

(B) The amount of a provisional benefit for a month shall equal the amount of the last monthly benefit payable to the individual under this title on the basis of an application increased by an amount equal to the amount, if any, by which such last monthly benefit would have been increased as a result of the operation of section 415(i) of this title.

(C)(i) Provisional benefits shall begin with the month in which a request for reinstatement is filed in accordance with paragraph (2)(A).

(ii) Provisional benefits shall end with the earliest of

(I) the month in which the Commissioner makes a determination regarding the individual's entitlement to reinstated benefits;

(II) the fifth month following the month described in clause (i);

(III) the month in which the individual performs substantial gainful activity; or

(IV) the month in which the Commissioner determines that the individual does not meet the requirements of paragraph (1)(B)(i) or that the individual's declaration made in accordance with paragraph (2)(A)(ii) is false.

(D) In any case in which the Commissioner determines that an individual is not entitled to reinstated benefits, any provisional benefits paid to the individual under this paragraph shall not be subject to recovery as an overpayment unless the Commissioner determines that the individual knew or should have known that the individual did not meet the requirements of paragraph (1)(B).

(j) Limitation on payments to prisoners

For provisions relating to limitation on payments to prisoners, see section 402(x) of this title.

3. 42 U.S.C. 1381a states as follows:

§ 1381a. Basic entitlement to benefits

Every aged, blind, or disabled individual who is determined under part A of this subchapter to be eligible on the basis of his income and resources shall, in accordance with and subject to the provisions of this subchapter, be paid benefits by the Commissioner of Social Security.

4. 42 U.S.C. 1382c(a)(3) states as follows:

§ 1382c. Definitions

* * * * *

(a)(3)(A) Except as provided in subparagraph (C), an individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

(B) For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific

job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

(C)(i) An individual under the age of 18 shall be considered disabled for the purposes of this subchapter if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

(ii) Notwithstanding clause (i), no individual under the age of 18 who engages in substantial gainful activity (determined in accordance with regulations prescribed pursuant to subparagraph (E)) may be considered to be disabled.

(D) For purposes of this paragraph, a physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

(E) The Commissioner of Social Security shall by regulations prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity. In determining whether an individual is able to engage in substantial gainful activity by reason of his earnings, where his disability is

sufficiently severe to result in a functional limitation requiring assistance in order for him to work, there shall be excluded from such earnings an amount equal to the cost (to such individual) of any attendant care services, medical devices, equipment, prostheses, and similar items and services (not including routine drugs or routine medical services unless such drugs or services are necessary for the control of the disabling condition) which are necessary (as determined by the Commissioner of Social Security in regulations) for that purpose, whether or not such assistance is also needed to enable him to carry out his normal daily functions; except that the amounts to be excluded shall be subject to such reasonable limits as the Commissioner of Social Security may prescribe. Notwithstanding the provisions of subparagraph (B), an individual whose services or earnings meet such criteria shall be found not to be disabled. The Commissioner of Social Security shall make determinations under this subchapter with respect to substantial gainful activity, without regard to the legality of the activity.

(F) Notwithstanding the provisions of subparagraphs (A) through (E), an individual shall also be considered to be disabled for purposes of this subchapter if he is permanently and totally disabled as defined under a State plan approved under subchapter XIV or XVI of this chapter as in effect for October 1972 and received aid under such plan (on the basis of disability) for December 1973 (and for at least one month prior to July 1973), so long as he is continuously disabled as so defined.

(G) In determining whether an individual's physical or mental impairment or impairments are of a sufficient

medical severity that such impairment or impairments could be the basis of eligibility under this section, the Commissioner of Social Security shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Commissioner of Social Security does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

(H)(i) In making determinations with respect to disability under this subchapter, the provisions of sections 421(h), 421(k), and 423(d)(5) of this title shall apply in the same manner as they apply to determinations of disability under subchapter II of this chapter.

(ii)(I) Not less frequently than once every 3 years, the Commissioner shall review in accordance with paragraph (4) the continued eligibility for benefits under this subchapter of each individual who has not attained 18 years of age and is eligible for such benefits by reason of an impairment (or combination of impairments) which is likely to improve (or, at the option of the Commissioner, which is unlikely to improve).

(II) A representative payee of a recipient whose case is reviewed under this clause shall present, at the time of review, evidence demonstrating that the recipient is, and has been, receiving treatment, to the extent considered medically necessary and available, of the condition which was the basis for providing benefits under this subchapter.

(III) If the representative payee refuses to comply without good cause with the requirements of subclause (II), the Commissioner of Social Security shall, if the Commissioner determines it is in the best interest of the individual, promptly suspend payment of benefits to the representative payee, and provide for payment of benefits to an alternative representative payee of the individual or, if the interest of the individual under this subchapter would be served thereby, to the individual.

(IV) Subclause (II) shall not apply to the representative payee of any individual with respect to whom the Commissioner determines such application would be inappropriate or unnecessary. In making such determination, the Commissioner shall take into consideration the nature of the individual's impairment (or combination of impairments). Section 1383(c) of this title shall not apply to a finding by the Commissioner that the requirements of subclause (II) should not apply to an individual's representative payee.

(iii) If an individual is eligible for benefits under this subchapter by reason of disability for the month preceding the month in which the individual attains the age of 18 years, the Commissioner shall redetermine such eligibility—

(I) by applying the criteria used in determining initial eligibility for individuals who are age 18 or older; and

(II) either during the 1-year period beginning on the individual's 18th birthday or, in lieu of a continuing disability review, whenever the

Commissioner determines that an individual's case is subject to a redetermination under this clause.

With respect to any redetermination under this clause, paragraph (4) shall not apply.

(iv)(I) Except as provided in subclause (VI), not later than 12 months after the birth of an individual, the Commissioner shall review in accordance with paragraph (4) the continuing eligibility for benefits under this subchapter by reason of disability of such individual whose low birth weight is a contributing factor material to the Commissioner's determination that the individual is disabled.

(II) A review under subclause (I) shall be considered a substitute for a review otherwise required under any other provision of this subparagraph during that 12-month period.

(III) A representative payee of a recipient whose case is reviewed under this clause shall present, at the time of review, evidence demonstrating that the recipient is, and has been, receiving treatment, to the extent considered medically necessary and available, of the condition which was the basis for providing benefits under this subchapter.

(IV) If the representative payee refuses to comply without good cause with the requirements of subclause (III), the Commissioner of Social Security shall, if the Commissioner determines it is in the best interest of the individual, promptly suspend payment of benefits to the representative payee, and provide for payment of benefits to an alternative representative payee of the

individual or, if the interest of the individual under this subchapter would be served thereby, to the individual.

(V) Subclause (III) shall not apply to the representative payee of any individual with respect to whom the Commissioner determines such application would be inappropriate or unnecessary. In making such determination, the Commissioner shall take into consideration the nature of the individual's impairment (or combination of impairments). Section 1383(c) of this title shall not apply to a finding by the Commissioner that the requirements of subclause (III) should not apply to an individual's representative payee.

(VI) Subclause (I) shall not apply in the case of an individual described in that subclause who, at the time of the individual's initial disability determination, the Commissioner determines has an impairment that is not expected to improve within 12 months after the birth of that individual, and who the Commissioner schedules for a continuing disability review at a date that is after the individual attains 1 year of age.

(I) In making any determination under this subchapter with respect to the disability of an individual who has not attained the age of 18 years and to whom section 421(h) of this title does not apply, the Commissioner of Social Security shall make reasonable efforts to ensure that a qualified pediatrician or other individual who specializes in a field of medicine appropriate to the disability of the individual (as determined by the Commissioner of Social Security) evaluates the case of such individual.

(J) Notwithstanding subparagraph (A), an individual shall not be considered to be disabled for purposes

of this subchapter if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled.

5. 20 C.F.R. 404.315(a) states as follows:

§ 404.315 Who is entitled to disability benefits.

(a) *General.* You are entitled to disability benefits while disabled before age 65 if—

(1) You have enough social security earnings to be *insured for disability*, as described in § 404.130;

(2) You apply;

(3) You have a disability, as defined in § 404.1505, or you are not disabled, but you had a disability that ended within the 12-month period before the month you applied; and

(4) You have been disabled for 5 full consecutive months. This 5-month waiting period begins with a month in which you were both insured for disability and disabled. Your waiting period can begin no earlier than the 17th month before the month you apply—no matter how long you were disabled before then. No waiting period is required if you were previously entitled to disability benefits or to a period of disability under § 404.320 any time within 5 years of the month you again became disabled.

6. 20 C.F.R. 404.321 (2001) (see 65 Fed. Reg. 42,782 (2000)) states as follows:

§ 404.321 When a period of disability begins and ends.

(a) *When a period of disability begins.* Your period of disability begins on the day your disability begins if you are insured for disability on that day. If you are not insured for disability on that day, your period of disability will begin on the first day of the first calendar quarter after your disability began in which you become insured for disability. Your period of disability may not begin after you become 65 years old.

(b) *When disability ended before December 1, 1980.* Your period of disability ends on the last day of the month before the month in which you become 65 years old or, if earlier, the last day of the second month following the month in which your disability ended.

(c) *When disability ends after November 1980.* Your period of disability ends with the close of whichever of the following is the earliest—

(1) The month before the month in which you become 65 years old;

(2) The month immediately preceding your termination month (§ 404.325); or

(3) If you perform substantial gainful activity during the reentitlement period described in § 404.1592a, the last month for which you received benefits.

(d) *When drug addiction or alcoholism is a contributing factor material to the determination of disability.* (1) Your entitlement to receive disability benefit payments ends the month following the month in which, regardless of the number of entitlement periods you may have had based on disability where drug addiction or alcoholism is a contributing factor material to the determination of disability (as described in § 404.1535)—

(i) You have received a total of 36 months of disability benefits. Not included in these 36 months are months in which treatment for your drug addiction or alcoholism is not available, months before March 1995, and months for which your benefits were suspended for any reason; or

(ii) Your benefits have been suspended for 12 consecutive months because of your failure to comply with treatment requirements.

(2) For purposes other than payment of your disability benefits, your period of disability continues until the termination month as explained in § 404.325.

7. 20 C.F.R. 404.1505 states as follows:

§ 404.1505 Basic definition of disability.

(a) The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you

must have a severe impairment, which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy. To determine whether you are able to do any other work, we consider your residual functional capacity and your age, education, and work experience. We will use this definition of disability if you are applying for a period of disability, or disability insurance benefits as a disabled worker, or child's insurance benefits based on disability before age 22 or, with respect to disability benefits payable for months after December 1990, as a widow, widower, or surviving divorced spouse.

(b) There are different rules for determining disability for individuals who are statutorily blind. We discuss these in §§ 404.1581 through 404.1587. There are also different rules for determining disability for widows, widowers, and surviving divorced spouses for monthly benefits for months prior to January 1991. We discuss these rules in §§ 404.1577, 404.1578, and 404.1579.

8. 20 C.F.R. 404.1509 states as follows:

§ 404.1509 How long the impairment must last.

Unless your impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months. We call this the duration requirement.

9. 20 C.F.R. 404.1520 states as follows:

§ 404.1520 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all evidence in your case record when we make a determination or decision whether you are disabled. When you file a claim for a period of disability and/or disability insurance benefits or for child's benefits based on disability, we use the following evaluation process. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider the effect of your physical or mental impairment; if you have more than one impairment, we will also consider the combined effect of your impairments. Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity, your past work, and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review your claim further. Once you have been found entitled to disability benefits, we follow a somewhat different order of evaluation to determine whether your entitlement continues, as explained in § 404.1594(f)(6).

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.

(d) *When your impairment(s) meets or equals a listed impairment in appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing any other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no

longer do this kind of work, we use a different rule (see § 404.1562).

10. 20 C.F.R. 404.1572 states as follows:

§ 404.1572 What we mean by substantial gainful activity.

Substantial gainful activity is work activity that is both substantial and gainful:

(a) *Substantial work activity.* Substantial work activity is work activity that involves doing significant physical or mental activities. Your work may be substantial even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before.

(b) *Gainful work activity.* Gainful work activity is work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized.

(c) *Some other activities.* Generally, we do not consider activities like taking care of yourself, household tasks, hobbies, therapy, school attendance, club activities, or social programs to be substantial gainful activity.

11. 20 C.F.R. 404.1592 (2001) (see 65 Fed. Reg. 42,787 (2001)) states as follows:

§ 404.1592 The trial work period.

(a) *Definition of the trial work period.* The trial work period is a period during which you may test your ability to work and still be considered disabled. It begins and ends as described in paragraph (e) of this section. During this period, you may perform *services* (see paragraph (b) of this section) in as many as 9 months, but these months do not have to be consecutive. We will not consider those services as showing that your disability has ended until you have performed services in at least 9 months. However, after the trial work period has ended we will consider the work you did during the trial work period in determining whether your disability ended at any time after the trial work period.

* * * * *

(e) *When the trial work period begins and ends.* The trial work period begins with the month in which you become entitled to disability insurance benefits, to child's benefits based on disability or to widow's, widower's, or surviving divorced spouse's benefits based on disability. It cannot begin before the month in which you file your application for benefits, and for widows, widowers, and surviving divorced spouses, it cannot begin before December 1, 1980. It ends with the close of whichever of the following calendar months is the earliest:

(1) The 9th month (whether or not the months have been consecutive) in which you have performed services if that 9th month is prior to January 1992;

(2) The 9th month (whether or not the months have been consecutive and whether or not the previous 8 months of services were prior to January 1992) in which you have performed services within a period of 60 consecutive months if that 9th month is after December 1991; or

(3) The month in which new evidence, other than evidence relating to any work you did during the trial work period, shows that you are not disabled, even though you have not worked a full 9 months. We may find that your disability has ended at any time during the trial work period if the medical or other evidence shows that you are no longer disabled. See § 404.1594 for information on how we decide whether your disability continues or ends.

12. 20 C.F.R. 416.260 states as follows:

§ 416.260 General.

The regulations in §§ 416.260 through 416.269 describe the rules for determining eligibility for special SSI cash benefits and for special SSI eligibility status for an individual who works despite a disabling impairment. Under these rules an individual who works despite a disabling impairment may qualify for special SSI cash benefits and in most cases for Medicaid benefits when his or her gross earned income exceeds the applicable dollar amount which ordinarily represents SGA described in § 416.974(b)(2). The calculation of this gross earned income amount, however, is not to be considered an actual SGA determination. Also, for purposes of determining eligibility or continuing eligibility for Medicaid benefits, a blind or disabled individual (no longer eligible for regular SSI benefits or for special SSI cash benefits) who, except for earnings, would otherwise be eligible for SSI cash benefits may be eligible for a special SSI eligibility status under which he or she is considered to be a blind or disabled individual receiving SSI benefits. We explain the rules for eligibility for special SSI cash benefits in §§ 416.261 and 416.262. We explain the rules for the special SSI eligibility status in §§ 416.264 through 416.269.

13. 20 C.F.R. 416.261 states as follows:

§ 416.261 What are special SSI cash benefits and when are they payable.

Special SSI cash benefits are benefits that we may pay you in lieu of regular SSI benefits because your gross earned income in a month of initial eligibility for regular SSI benefits exceeds the amount ordinarily considered to represent SGA under § 416.974(b)(2). You must meet the eligibility requirements in § 416.262 in order to receive special SSI cash benefits. Special SSI cash benefits are not payable for any month in which your countable income exceeds the limits established for the SSI program (see subpart K of this part). If you are eligible for special SSI cash benefits, we consider you to be a disabled individual receiving SSI benefits for purposes of eligibility for Medicaid. We compute the amount of special SSI cash benefits according to the rules in subpart D of this part. If your State makes supplementary payments which we administer under a Federal-State agreement, and if your State elects to supplement the special SSI cash benefits, the rules in subpart T of this part will apply to these payments.

14. 20 C.F.R. 416.262 states as follows:

§ 416.262 Eligibility requirements for special SSI cash benefits.

You are eligible for special SSI cash benefits if you meet the following requirements—

(a) You were eligible to receive a regular SSI benefit or a federally administered State supplementary payment (see § 416.2001) in a month before the month for which we are determining your eligibility for special SSI cash benefits as long as that month was not in a prior period of eligibility which has terminated according to §§ 416.1331 through 416.1335;

(b) In the month for which we are making the determination, your gross earned income exceeds the amount ordinarily considered to represent SGA under § 416.974(b)(2);

(c) You continue to have a disabling impairment;

(d) If your disability is based on a determination that drug addiction or alcoholism is a contributing factor material to the determination of disability as described in § 416.935, you have not yet received SSI cash benefits, special SSI cash benefits, or special SSI eligibility status for a total of 36 months, or Social Security benefit payments when treatment was available for a total of 36 months; and

(e) You meet all the nondisability requirements for eligibility for SSI benefits (see § 416.202).

We will follow the rules in this subpart in determining your eligibility for special SSI cash benefits.

Supreme Court, U.S.
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RECORD NO.00-1937 (2)

IN THE
Supreme Court of The United States

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY,

Petitioner,

v.

CLEVELAND B. WALTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether a claimant is entitled to disability benefits if he has a severe physical or mental impairment which has lasted or is expected to last at least 12 months, but he engages in substantial gainful activity within 12 months of his onset date.

2. Whether a claimant under Title II is entitled to a trial work period if he has a severe impairment which has lasted or is expected to last more than 12 months, even though he returns to substantial gainful activity after the five month waiting period but within 12 months of his onset date.

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STATEMENT OF THE CASE

Cleveland Walton, a college graduate and teacher, was denied disability benefits, despite his continuing Listing-level psychiatric impairment, for the sole reason that he returned to work (as a grocery store clerk) despite his continuing impairment, within 12 months of his October 1994 onset date. Walton's return to work occurred after his application for benefits and after the five month waiting period, but before his disability was adjudicated and before 12 months had elapsed from the date he first became disabled.

Walton was hospitalized with major depression, recurrent with psychotic features, in October 1990 and again in May 1994. Appendix to Petition ("App.") 55a. After losing his job as a teacher in October 1994, Walton attempted a series of jobs, but he was fired from each after a brief work period, such that the Administrative Law Judge ("ALJ") deemed them to be unsuccessful work attempts. App. 53a. Walton was hospitalized a third time in March 1995 and was diagnosed at this time as suffering with paranoid schizophrenia. App. 56a. At the time of both administrative hearings in July 1996 and June 1997, the ALJ concluded that Walton had a Listing-level psychiatric impairment. App. 59a, 45a. However, because Walton had attempted to work as a grocery store clerk, beginning with part-time work in May 1995, and because he earned more than the

substantial gainful activity ("SGA") level of $500 in October 1995, the ALJ, after a second administrative hearing, concluded that Walton was not under a disability and consequently was not entitled to a period of disability, cash benefits, or a trial work period since he had not been prevented from engaging in SGA for a continuous period of at least 12 months. App. 44a, 45a.

The Appeals Council and the District Court subsequently upheld the ALJ's conclusions. App. 36a-38a; App. 15a-26a. On appeal, the Fourth Circuit Court of Appeals affirmed the district court's holding that Walton had returned to SGA in October 1995, when his earnings exceeded $500, but reversed the district court's holding that Walton was not under a disability when he engaged in SGA prior to the lapse of 12 months from his onset date and prior to adjudication of his claim and reversed the lower court's holding that Walton was not entitled to a trial work period. Walton v. Apfel, 235 F.3d 184 (4th Cir. 2000), App. 2a, 7a.

REASONS FOR DENYING THE PETITION

This Court should deny the Commissioner's Petition for a Writ of Certiorari. The Petition buries in a footnote on the last full page of the Petition the fact that the Fourth Circuit's opinion in this case is in accordance with the rulings of four other Courts of Appeals in holding that a trial work period is available if the claimant has an impairment which has lasted, or is expected to last, at least 12 months even if he

returns to work after the five month waiting period but before 12 months from onset of the disability. Salamalekis v. Commissioner of Soc. Sec., 221 F.3d 828 (6th Cir. 2000); Newton v. Chater, 92 F.3d 688 (8th Cir. 1996); Walker v. Secretary of Health and Human Services, 943 F. 2d 1257 (10th Cir. 1991); McDonald v. Bowen, 818 F.2d 559 (7th Cir. 1986). There is no split in the circuits necessitating the guidance of this Court. On the issue of the availability of a trial work period under the facts of this case, five Courts of Appeals have ruled with one voice (and without one dissenting opinion) and no circuits have ruled otherwise. Only the Commissioner remains unconvinced by the rulings of these Courts of Appeals and numerous district courts which have repeatedly concluded that Social Security's policy is contrary to the unambiguous language of the statute governing entitlement to disability benefits and governing entitlement to a trial work period.

Having virtually no case law to support its position, the Commissioner relies instead upon a new regulation which is irrelevant to this action because it did not become effective until August 2000 and cannot be retroactively applied to this case, 65 Fed. Reg. 42,772 (2000), and upon dire and unsubstantiated statements regarding the supposed fiscal and programmatic impact the Fourth Circuit's ruling allegedly would have upon Social Security's operations. These arguments are without merit and are in any event inappropriate to the court's determination

regarding the proper construction of the statute governing entitlement to disability benefits and entitlement to a trial work period. The Fourth Circuit Court of Appeals properly construed that statute; consequently, its ruling, and the rulings of the four other courts of appeals, should be upheld by denying the Petition for a Writ of Certiorari.

I. The Fourth Circuit Properly Concluded that, According to the Plain Language of the Statute and Relevant Regulations, It is the Impairment, Not the Inability to Engage in SGA, Which Must Last 12 Months.

"Disability" is defined by the Social Security Act and regulations as the:

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months[.]

42 U.S.C. § 423 (d)(1)(A). As the Fourth Circuit concluded, it is evident from the plain language of the statute that the phrase "which has lasted or can be expected to last for a continuous period of not less than 12 months" refers to the impairment, not to the inability to engage in SGA. App. 8a. Social Security Ruling ("SSR") 82-52 and its successor 1995 Notice of Proposed Rulemaking, 60 Fed. Reg. 12166, upon which the Commissioner relies[1], however, construes the language to mean that "It is the inability to engage in SGA because of the impairment that must last the required 12-month period." SSR 82-52. Such a construction of the language is

absurd, leading, as it must, to the conclusion that the inability to engage in SGA can be expected to result in death.

The Fourth Circuit noted: "In addition to the facial clarity of the language, the grammatical structure and logic of the statute further compel the conclusion that the clause, 'which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months,' refers to the impairment, not to the inability to engage in SGA; the clause manifestly does not modify 'substantial gainful activity'." App. 7a-8a.

The fact that it is the impairment, not the inability to engage in SGA, which must last 12 months is supported by the language of other regulations which further define the disability statute.

> Unless your impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months. We call this the duration requirement.

20 CFR § 404.1509 (emphases added). This is quite explicit language, clearly linking the 12 month requirement to the impairment, not to the inability to engage in SGA. Equally compelling is the regulation regarding unrelated severe impairments:

> We cannot combine two or more unrelated severe impairments to meet the 12-month duration test. If you have a severe impairment(s)

[1] The Commissioner also relies heavily—and inappropriately—upon new final regulations found at 65 Fed. Reg. 42,772 (2000). These regulations became effective August 10, 2000, 65 Fed. Reg. 42772, and are inapplicable to this case.

> and then develop another unrelated severe impairment(s) but neither one is expected to last for 12 months, we cannot find you disabled, even though the two impairments in combination last for 12 months.

20 CFR § 404.1522(a). If it were the inability to engage in SGA which must last 12 months, then it would not matter whether two or more unrelated severe impairments were combined to meet the 12-month duration test. Instead, it is evident from the language of these regulations that the duration requirement is met if the impairment, not the inability to perform SGA, has lasted or is expected to last at least 12 months.

The regulation describing the purpose of the Listing of Impairments distinguishes between the severity of the impairment and the duration of the impairment:

> The Listing of Impairments describes, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity. Most of the listed impairments are permanent or expected to result in death, or a specific statement of duration is made. For all others, the evidence must show that the impairment has lasted or is expected to last for a continuous period of at least 12 months.

20 CFR § 404.1525(a). This distinction between the severity and duration requirements is also reflected in 20 CFR § 404.1520, regarding the evaluation of disability in general, which states:

> Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled.

The distinction between the duration requirement and severity requirement is also consistent with the legislative history of the disability provisions. Considering the definition of "disability," which was first added to the Social Security Act in 1954[2], the Senate Committee on Finance stated that the determination of disability has two aspects: "(1) There must be a medically determinable impairment of serious proportions which is expected to be of long-continued and indefinite duration or to result in death, and (2) there must be a present inability to engage in substantial gainful work by reason of such impairment." Stone v. Heckler, 752 F.2d 1099, 1105 (5th Cir. 1985), quoting S. Rep. No. 1987, 83d Cong., 2d Sess. 21.

The Tenth Circuit in Alexander v. Richardson, 451 F.2d 1185 (10th Cir. 1971), cert. denied 407 U.S. 911 (1972), and the Eighth Circuit in Titus v. Sullivan, 4 F.3d 590 (8th Cir. 1993), relied upon by the Commissioner in support of its position that the inability to engage in SGA and the impairment must both last 12 months, blurred the distinction between the duration requirement and the severity requirement. The Alexander court concluded that the "Inability to engage in any gainful activity and the impairment which causes it cannot be separated. The two components of disability must exist at the same time." 451 F.2d at 1186. While the statute does require that the severity requirement (inability to engage in SGA) and the duration requirement exist at the same time, it does not require that

[2] The "long-continued and indefinite duration" language was changed to the current 12 month

they coexist for 12 months in order to qualify for benefits. In addition, the facts of Alexander and Titus suggest that no consideration was given to the availability of a trial work period, or to the expectancy language (See pages 24-26, infra) and the need to consider the entitlement criteria prospectively from the point of application and to award benefits—and a trial work period--from the first month all eligibility criteria are met (See pages 25, 27-28, infra).

Significantly, in more recent cases, the Tenth Circuit in Walker v. Secretary of Health & Human Services, 943 F.2d 1257 (10th Cir. 1991), and the Eighth Circuit in Newton v. Chater, 92 F.3d 688 (8th Cir. 1996), construed the language of the statute governing entitlement to disability benefits and the statute governing eligibility for a trial work period to conclude that benefits are payable and a trial work period is available if the impairment was expected to last at least 12 months, even if the return to work occurred within 12 months of onset. Although, in these two cases, the claimant's return to work actually occurred more than 12 months after onset, the Tenth and Eighth Circuits' construction of the entitlement and the trial work period statutes is in accordance with the Fourth Circuit's decision in this case, the Seventh Circuit's decision in McDonald v. Bowen, 818 F.2d 559 (7th Cir. 1986), the Sixth Circuit's decision in Salamalekis v. Commissioner of Soc. Sec., 221 F.3d 828 (6th Cir. 2000), and numerous district courts' rulings. In each of

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duration requirement in 1965.

these cases, benefits were payable and a trial work period was available despite the return to work within 12 months of onset. See pages 18-22 infra. Even if the impairment and the inability to engage in SGA must coexist for 12 months, the language of the entitlement statute requires that benefits be payable from the first month all criteria are met. A trial work period is also available from the very first month of eligibility. Therefore, if, at the time Walton returned to work, he had an impairment--and an inability to engage in SGA--which was expected to last 12 months, then he met all the criteria of entitlement and was entitled to disability benefits and to a trial work period.

The Fourth Circuit's holding that the 12 month duration requirement applies only to the impairment, in sharp contrast to the agency's position as reflected in SSR 82-52, properly construes the language of the statute and is consonant with the rulings of many courts before it. The Fifth Circuit in Singletary v. Bowen, 798 F.2d 818, 821 (5th Cir. 1986), concluded that the ALJ's determination that, because Singletary's condition had not prevented him from working for more than 12 continuous months, he was not entitled to disability benefits, "confuses the duration requirement, which applies only to the impairment, with the severity requirement, which determines whether the impairment prevents the claimant from working." After quoting the disability definition, the Court stated: "The statute quite clearly requires that it is the impairment only which must last for a

continuous period. Normally, of course, when a claimant has an impairment severe enough to prevent him from working, he will be unable to work for as long as the impairment lasts . . . . The statute, however, does not require that a claimant be unable to engage in work during the entire 12 month period." Id. at 821.

Other courts, construing the statutory language and the legislative history, have also held that the duration requirement applies, not to the inability to engage in SGA, but to the impairment itself. See, e.g., McDonald v. Bowen, 818 F.2d 559 (7th Cir. 1986); White v. Finch, 311 F.Supp. 307 (D. Mass. 1970)(holding that claimant was entitled to benefits because his impairment had lasted more than 12 months even though he had not been unable to work for 12 continuous months); Hunter v. Department of Health & Human Services, 851 F.Supp. 75 (E.D.N.Y. 1994); Jenkins v. Heckler, 783 F.Supp. 998 (D.S.C. 1992).

There is no doubt that Walton's impairment has lasted more than 12 months. The ALJ found, in his first decision, that Walton's impairment met the criteria of Listing 12.03, (App. 59a); and the ALJ concluded in his second hearing decision, more than two and one-half years after Walton's October 1994 onset date, that Walton continued to suffer with a Listing-level impairment, App. 45a. That fact is uncontested.

The Commissioner erroneously suggests that the Fourth Circuit's decision converts a long-term disability program into a short-term disability program in

contravention of Congressional intent. Petition 16. The two requirements that the impairment be expected to last 12 months and that it be of such severity at that time as to preclude SGA, in combination, eliminate short-term, transient disabilities. Some impairments, although of long-term duration—e.g. controlled hypertension—are never so severe as to prevent SGA and therefore do not meet the severity requirement, while other impairments, although of substantial severity at the outset, would never be expected to last 12 months and consequently do not meet the duration requirement. In either instance, the person would be denied disability benefits. In sharp contrast, Walton's schizophrenia is an impairment which satisfies both criteria: it is of such severity as to prevent SGA and it is of documented long-term duration.

The Commissioner also suggests that there is no plausible reason why Congress would have insisted that the impairment last 12 months, but not place a minimum duration requirement upon the inability to work. Petition 23. This argument is flawed for several reasons. First, there is a minimum requirement under Title II of a five month waiting period during which disability benefits are not payable and a trial work period is not available. In contradiction to the Commissioner's apparent suggestion that the five month waiting period should in effect be expanded to a 12 month waiting period before benefits are payable, Congress took action in 1972 to reduce the waiting period from six to five months.

The Commissioner's argument with regard to the Supplemental Security Insurance ("SSI") program is also without merit.[3] The SSI regulations quite clearly show that one can engage in SGA and still have a disabling impairment: "Under these rules an individual who works despite a disabling impairment may qualify for special SSI cash benefits . . . when his or her gross earned income exceeds the applicable dollar amount which ordinarily represents SGA . . . ." 20 CFR § 416.260, App. 102a. This regulation demonstrates that a disabling impairment and performance of SGA can coexist in a courageous and determined claimant, such as Cleveland Walton, who struggles against considerable odds to work despite continuing impairment.

These regulations and Congress' action to reduce the waiting period suggest the reason Congress did not insist that the inability to perform SGA last 12 months. Congress wanted to encourage disabled persons to try to work as soon as possible. The statute regarding the trial work period and the SSI regulations both reflect Congress' intention to encourage, not discourage, early returns to work. The

[3] Although Walton applied for both Title II and SSI disability benefits, the SSI portion has never been at issue in this appeal. Because Walton did not apply for SSI until April 1995, after the five month waiting period from his October 1994 onset date had elapsed, and because SSI benefits are not payable prior to the date of application, 20 CFR § 416.501, SSI benefits were never truly at issue. Walton's primary concern has always been his entitlement to Title II disability benefits and to a trial work period under Title II.

In any event, the Commissioner's argument regarding SSI benefits is misplaced. SSI claimants, like Title II claimants, must have an impairment which is expected to last 12 months or result in death (satisfying the duration requirement) and that impairment must be of such severity as to prevent SGA (satisfying the severity requirement).

Commissioner's long-standing policy, in sharp contrast, effectively penalizes those claimants, like Cleveland Walton, who persistently try to return to work despite continuing severe impairment. Social Security's policy essentially tells claimants to remain home at least 12 months before they try to work. By doing so, Social Security discourages good faith efforts to try to work and undermines initiative, in stark contrast to Congress' intent to encourage early returns to work, as expressed in the trial work period statute which makes a trial work period available from the very first month a person is entitled to benefits.

The Commissioner's complaints of the "profound programmatic and fiscal implications for the Social Security programs," Petition 17, are vague and unsubstantiated, of doubtful accuracy, and in any event misplaced in the judicial arena. There is no documentation whatsoever for the dire prediction that implementation of the Fourth Circuit decision would cost $9.8 billion over the next ten years in the Fourth Circuit alone. Petition 15, 18. This unsupported claim was never raised in the lower courts. Furthermore, these projected fiscal implications seem to be based upon a fundamentally flawed characterization of Walton's position. Walton has never suggested that he is entitled to an award of disability benefits for an indefinite period of time while engaged in SGA.[4] Rather, Walton is

[4] Walton was later approved for disability benefits based upon a second application and those benefits are continuing. Walton has been unable to perform any work since November 1999 due to his psychiatric impairment.

simply seeking the award of benefits during his trial work period[5] and three successive months and for any months, during the 36 month re-entitlement period, when he has been unable to engage in SGA. Moreover, even if these unsubstantiated figures are accurate, they are more appropriately presented in the legislative forum, not before this Court charged with the construction of the law. If proper construction of the law demands that benefits be paid, the judiciary may not refuse benefits on the basis of ill-defined fiscal constraints. Such considerations, if valid, must be addressed to the legislative branch, not the judiciary.

The Commissioner's argument regarding the increased administrative burden upon the agency from the "dramatic[] increase [in] the number of applications the agency must process" [Petition 18] if the Fourth Circuit's decision is implemented is also of doubtful validity. As a practical matter, claimants do not decide whether or not to apply for disability benefits based upon a court decision of which most claimants will be completely unaware. Further, it should not be Social Security's desire "to hide the ball" by discouraging disabled persons from applying simply because there will be an increased administrative burden on the agency.

[5] The regulations provide that after the trial work period has ended, the work done during the trial work period will be evaluated to determine whether the disability ended at any time after the trial work period. 20 CFR § 404.1592(a).

II. In Accordance With Four Other Courts of Appeals and Numerous District Courts, The Fourth Circuit Properly Found That Walton Was Entitled to a Trial Work Period.

A trial work period "is a period during which you may test your ability to work and still be considered disabled." 20 CFR § 404.1592(a). "A period of trial work for any individual shall begin with the month in which he becomes entitled to disability insurance benefits[.]" 42 U.S.C. § 422(c)(3) (emphasis added). "The trial work period begins with the month in which you become entitled to disability insurance cash benefits. . . It cannot begin before the month in which you file your application for benefits . . . ." 20 CFR § 404.1592(e) (emphasis added).

The requirements for entitlement to disability benefits are set out in 42 U.S.C. § 423(a)(1):

> Every individual who—
> (A) is insured for disability insurance benefits. . .,
> (B) has not attained retirement age . . . ,
> (C) has filed an application for disability insurance benefits, and
> (D) is under a disability (as defined in subsection (d) of this section),
>
> shall be entitled to a disability insurance benefit (i) for each month beginning with the first month after his waiting period (as defined in subsection (c)(2) of this section) in which he becomes so entitled to such insurance benefits[.]

42 U.S.C. § 423(a)(1)(emphasis added); See also, 20 CFR § 404.315(a).

The statute and the regulations make clear that a claimant is "entitled" to disability benefits beginning with "the first month covered by your application in

which you meet all the other requirements for entitlement." 20 CFR § 404.316(a) (emphasis added). "Your period of disability begins on the day your disability begins if you are insured for disability on that day." 20 CFR § 404.321(a).

There is no requirement that a claimant wait 12 months prior to becoming 'entitled' to benefits. In fact, Congress did not intend such a delay in the award of benefits. Congress initially imposed a six month waiting period, but chose in 1972 to reduce the waiting period to five months, in apparent recognition of the financial hardship caused by the six month wait. "Reducing the waiting period from 6 months to 5 months would diminish the financial hardships faced by those workers who have little or no savings or other resources to fall back on during the early months of long-term total disability." H. Rep. No. 231, 92d Cong., 1st Sess. Congress obviously intended to get benefits to disabled applicants sooner rather than later and there was no intent to make applicants wait for 12 months to see whether they might recover from their impairment. "Congress could have easily required, as does S.S.R. 82-52, a waiting period of a year before awarding any benefits. But it is evident from an analysis of the statute that, as a matter of policy, it chose not to do so." Hunter, supra, 851 F.Supp. at 77.

Based upon the plain language of the statute and regulations, Walton was "entitled" to disability benefits, and consequently to a trial work period, beginning with the first month he met all the requirements. As of April 1995, prior to the

beginning of his attempt to work at Food Lion, Walton met all the requirements for entitlement status: he was insured; he had not reached retirement age; he had applied; and he had been disabled for five consecutive months. He had a disability as defined by 42 U.S.C. § 423 (d)(1)(A) because he had a severe mental impairment which was expected to last for a continuous period of at least 12 months.[6] Because Walton met all the criteria in April 1995, he was "entitled" to disability benefits beginning that month; and therefore, according to the plain language of the statute and supportive regulations, he was also entitled, at that time, to a trial work period.

The Fourth Circuit's construction of the statute and regulations is in accordance with the rulings of four other Courts of Appeals and numerous district courts throughout the nation which have held that a claimant is entitled to a trial work period if he has an impairment which has lasted, or is expected to last, at least 12 months even if he returns to work after the five month waiting period but before 12 months from onset of the disability. These Courts, consistent with the language of the statute and regulations, have focused quite properly on the five month waiting period because the statute and regulations require that benefits be

[6] A medical expert concluded prior to Walton's first hearing that Walton's impairment met the criteria of Listing 12.03 and that his impairments had lasted or could be expected to last at least 12 months. App. 56a-57a. The ALJ found that Walton's impairment did meet the criteria of Listing 12.03 and that his impairment "has precluded him from working for at least 12 continuous months." App. 59a.

paid in the first month all criteria are met, including passage of the waiting period, and they clearly state that a trial work period is available from the very first month in which a person becomes entitled to benefits.

The precedential case of McDonald v. Bowen, 818 F.2d 559, 564 (7th Cir. 1986), held that an "individual who suffers from an impairment that is expected to last at least twelve consecutive months is entitled to benefits (as well as to a trial work period) after completing the five-month waiting period." Even though the claimant had returned to work before the hearing and before 12 months had elapsed from the date of onset, the Court concluded that the Secretary was required to determine whether the claimant suffered from an impairment which was reasonably expected to last 12 months and whether the claimant had been disabled for five continuous months prior to her return to work; if so, then the Secretary was required to decide whether a nine-month trial work period covered her return to work and could not deny benefits to one enjoying a trial work period "on the basis that she had thereby demonstrated an ability to engage in substantial gainful activity." Id. at 565.

Likewise, the Tenth Circuit in Walker v. Secretary of Health & Human Services, 943 F.2d 1257 (10th Cir. 1991), concluded that an individual who suffers with an impairment which has lasted, or is expected to last, 12 months is entitled to disability benefits and to a trial work period after waiting five months. Similarly,

the Eighth Circuit in Newton v. Chater, 92 F.3d 688, 694 (8th Cir. 1996), rejected the rationale of SSR 82-52 and held:

> According to the statute and regulations, though, a trial work period starts in the month that entitlement to disability benefits begins, which is the month following five consecutive months of being under a disability that has lasted or is expected to last a total of twelve continuous months. . . In other words, under the statute, a claimant need not have had a disability for twelve consecutive months before he may test his ability to work.

Most recently, the Sixth Circuit in Salamalekis v. Commissioner of Social Security, 221 F.3d 828 (6th Cir. 2000), ruled that the claimant was entitled to disability benefits and to a trial work period despite his return to work within 12 months of his onset date. The Court noted that, pursuant to the plain language of the Act, a person can take advantage of a trial work period once he becomes entitled to disability benefits—that is, once he establishes the five prerequisites of entitlement: insured status, is under retirement age, has filed an application, the five month waiting period has expired, and is under a disability. The Court explicitly rejected the Commissioner's position that Salamalekis' return to work within 12 months of onset precluded a finding of disability:

> This position ignores the complete definition of disability under the Act, which covers not only those impairments that actually last 12 months, but also those impairments expected to last 12 months. At the time Salamalekis returned to work on March 2, 1992, his impairment was ongoing and was expected to last for 12 months, and the SSA so found. A claimant who meets Congress's prospective standard for disability cannot be denied benefits based on hindsight.

Id. at 832.

Repeatedly, district courts throughout the nation have adopted the rationale of the McDonald, Walker, Newton and Salamalekis courts, and their construction of the statute and regulations, to conclude that a claimant who has an impairment which has lasted, or is expected to last, at least 12 months is entitled to a trial work period, after the five month waiting period, even if he or she returns to work within 12 months of the onset date. See, e.g., Mulderig v. Sullivan, 1993 WL 22152 (S.D.N.Y. 1993)(return to work 11 months after onset date did not preclude entitlement to a trial work period and to disability benefits. "Therefore, if a claimant has filed an application, and has been disabled for five months from an impairment which is expected to last for at least twelve months, he is 'entitled' to benefits and, in turn, a trial work period."); Fabel v. Shalala, 891 F.Supp. 202 (D.N.J. 1995)(despite claimant's return to SGA eight months after her onset date, she was entitled to benefits and to a trial work period because she had met the four statutory requirements and was therefore "entitled" to benefits five months after the date her disability commenced, regardless of when SSA formally awarded benefits, and a person "entitled" to benefits may also engage in a trial work period); Hunter v. Department of Health & Human Services, 851 F.Supp. 75 (E.D.N.Y. 1994)(because there was the expectation that Hunter would remain disabled, she was entitled to disability benefits and to a trial work period even

though she returned to work within 12 months of her onset date); Wilson v. Shalala, 841 F.Supp. 1491(E.D. Wash. 1994)(despite claimant's return to work six months after onset, she was entitled to disability benefits, and therefore to a trial work period, once she had filed an application and been disabled for a period of five consecutive months); Tepfer v. Secretary of Health & Human Services, 712 F.Supp. 156 (W.D. Ark. 1989)(claimant who returned to work 11 months after onset was entitled to a trial work period unless, at the time of the return to work, her disability had not lasted, and could not have been expected to last, 12 months); Goldstein v. Harris, 517 F.Supp. 1314, 1316-17 (S.D.N.Y. 1981)(ALJ erred in concluding that claimant's return to work more than five months after onset precluded entitlement to disability benefits and eligibility for a trial work period. "Once a person becomes eligible for disability-insurance benefits—i.e., five months after the onset of the disability, 42 U.S.C. § 423—he may commence a trial work period."); Darring v. Callahan, 1997 U.S. Dist. LEXIS 15187, 15161 (S. Ala. 1997)(follows Seventh, Eighth and Tenth Circuit precedent to conclude that Commissioner had erred in failing to consider whether work performed within 12 months of onset date should be considered trial work if claimant suffered from an impairment which, as of the onset date, was reasonably expected to last at least 12 months and if claimant had been disabled five months prior to his return to work); Deihl v. Secretary of Health and Human Services, 835 F.Supp. 1182 (C.D. Cal.

1993) (concluding that claimant, whose impairment was expected to last more than 12 months, was entitled to a trial work period after the five month waiting period even though he had returned to work within 12 months of onset); Jenkins v. Heckler, 783 F.Supp. 998 (D.S.C. 1992).

In each[7] of these cases, the claimant had returned to work prior to final adjudication of their claim and within 12 months of their onset date. Each court interpreted the language of the statute and regulations regarding entitlement to benefits and to a trial work period to hold that a claimant is "entitled" to disability benefits—and therefore to a trial work period—in the first month he meets all the criteria, including passage of the five month waiting period, and therefore held that these claimants were entitled to a trial work period.

Likewise, in the case at bar, if, as the medical record clearly establishes, Walton had an impairment which was expected to last at least 12 months, then he was entitled to disability benefits beginning in April 1995, when his five month waiting period had elapsed. Consequently, his return to work in May 1995 must be considered as part of a trial work period and Social Security may not deny benefits to Walton on the basis that he had, by that work, demonstrated an ability to engage in SGA. McDonald, supra, 818 F.2d at 565 ("Absent any medical or other

[7] With the exception of Newton and Walker, where the return to SGA occurred more than 12 months after onset, in all the other cited cases the return to SGA occurred after the five month waiting period but within 12 months of the onset date.

evidence that demonstrates that plaintiff was able to engage in substantial gainful activity, the Secretary may not deny benefits to an individual enjoying a trial work period on the basis that she had thereby demonstrated an ability to engage in substantial gainful activity.").

In contrast to the Commissioner's position, the Fourth Circuit and other courts' conclusion is fully in accordance with the language of the statute and regulations and is consistent with the legislative history as well. Congress did not intend for claimants to wait 12 months to see whether their impairment would improve--or, under the Commissioner's interpretation of the disability definition--to see whether they would return to work, within 12 months. Congress did impose a waiting period during which no Title II disability benefits could be paid to accommodate its concern that persons with truly short-term impairments would not be paid disability benefits. Congress certainly could have imposed a 12 month waiting period, but it chose not to do so. In sharp contrast to Congress' 1972 action to reduce the waiting period, the Commissioner's interpretation would effectively increase the waiting period to 12 months.

To interpret the statute as the Commissioner does leads to a result which is either contrary to the language of the statute and regulations, or which is patently unfair and arbitrary on its face. The Commissioner suggests that the Agency could decide a claim within 12 months of the alleged onset and apply the "can be

expected to last at least 12 months" language to approve benefits. Petition 25. Applying the Commissioner's reasoning, a person could be approved for benefits prior to the end of the 12 months based upon an expectancy and still return to work within 12 months of onset. What then? Either the benefits, which had already been awarded, would be deemed overpayments and subject to recoupment, in clear contradiction to the expectancy language of the statute, or, if the beneficiary is allowed to retain those benefits, he is arbitrarily being treated in a more favorable manner than the claimant whose disability case is not finally adjudicated until more than 12 months after onset. Neither result is justifiable.

If the person who is paid benefits based upon the expectation that he would be unable to engage in SGA for more than 12 months but who then returns to SGA within 12 months of onset is forced to repay those benefits, then the Commissioner has effectively eliminated the "can be expected to last" provision out of the statute, because no one is entitled to keep benefits unless their disability has, in fact, lasted at least 12 months. Such an interpretation effectively changes the five month waiting period to a 12 month waiting period, in contradiction to the explicit language of the statute and regulations and in contradiction to the expressed intention of Congress.

The Sixth Circuit considered this problem in Sierakowski v. Weinberger, 504 F.2d 831 (6th Cir. 1974). In that case, the claimant had been approved for

disability benefits based upon the belief that his impairment was reasonably expected to last for more than 12 months. When he returned to work within 12 months of his onset date, the Appeals Council, on its own motion, concluded that he was never entitled to a period of disability because he had returned to work within 12 months of onset. The Sixth Circuit concluded that Sierakowski's return to work did not oblige him to repay the benefits he had received.

> The result reached by the Secretary and by the District Court is to read into the statute a provision for the conditional payment of benefits, repayable where the expected duration does not develop, unless excused under Section 404(b). We find nothing in the statutory language to support such a view, and much in the legislative history to refute it. The statute plainly says that it permits benefits where the inability "can be expected to last for a continuous period of not less than twelve months." We conclude that by the use of the cited language the Congress established a prospective standard whereas the Secretary urges one governed by hindsight.
>
> . . .
>
> We recognize that the construction urged by the Secretary results perhaps in more certainty and is thus easier of application, but this does not, in our view, justify a departure from Congressional intent. Furthermore, that construction tends to penalize good faith and diligence. It takes little imagination to conclude that a claimant less motivated than plaintiff here would be sorely tempted to sit out the full twelve months if he knew that the law imposed such a forfeiture for an earlier return to gainful activity.

Id. at 833-35.

Similarly, in Kendrick v. Califano, 460 F.Supp. 561 (E.D. Va. 1978), the Court declined to require the repayment of benefits received despite the claimant's return to work within 12 months of onset.

It is apparent . . . that the Secretary construed the Social Security Act as allowing benefits only when the claimant is in fact precluded from working for a continuous twelve-month period. Applying this interpretation, the Secretary denied benefits because plaintiff's disease has never forced him to refrain completely from work for a period of one year. The Court finds that this interpretation of the Act is erroneous in two respects.

First, the Act requires neither that the disability actually continue for 12 months nor that the claimant in fact be unable to work for 12 months. There are two steps to a finding of 'disability': first, a finding of a medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of at least 12 months; second, a finding that the impairment in fact causes an inability to engage in any substantial gainful activity . . . . The Act clearly allows benefits not only for those whose impairments last for a continuous 12-month period, but also for those whose impairments are expected to last for 12 months. The expectation, not the reality, of a 12-month impairment is sufficient.

. . .

> The significant point here is that a claimant whose disability was expected to last at least twelve months does not automatically lose entitlement to all benefits he received merely because he worked within the 12-month period.

Id. at 567 (citations omitted).

The Commissioner suggests that the Fourth Circuit's ruling regarding the availability of a trial work period is dependent upon its resolution of the duration requirement. Petition 23 and fn. 8, p. 23. The Court concluded that under the statute a trial work period "shall begin with the month in which [the claimant] becomes entitled to disability insurance benefits." App. 9a-10a. Because Walton met all requirements of entitlement as of April 1995, he was entitled to benefits

and to a trial work period. Id. The availability of a trial work period under the facts of this case is not dependent upon a finding that the 12 month duration requirement applies to the impairment, not the inability to engage in SGA. Rather, the expectancy language of the disability definition and the prospective perspective required by the entitlement statute, in combination, assure that a trial work period is available in this case even if the 12 month duration requirement applies to the inability to engage in SGA.

The language of the statute requires that a prospective perspective be used from the date of application to assess whether all five prerequisites are met. Congress dictates this result by stating that benefits must be payable from the first month that all requirements are met, including passage of the five month waiting period. The Court in Nappa v. Secretary of U. S. DHHS, 731 F.Supp. 579, 585 (E.D.N.Y. 1990), concluding that the claimant was not entitled to a trial work period because her work was performed prior to her application, recognized the prospective standard which Sierkowski and McDonald applied. "Although the requirement of a twelve month continuous disability is 'forward-looking and is not to be nullified by hindsight,' it is evident that it is forward-looking from the point an application is filed." Id. (emphasis added). Likewise, the Sixth Circuit in Salamalekis applied a prospective standard for assessing disability which could not be reversed in hindsight. Salamalekis, supra, 221 F.3d at 832.

At the point Walton filed his application, he had an impairment—and an inability to engage in SGA--which was expected to last 12 months and therefore he was entitled to disability benefits and to a trial work period once his five month waiting period passed. To consider the requirements in hindsight after the 12 months have elapsed is contrary to the statute and regulations because it fails to award benefits in the first month in which all the statutory requirements are satisfied and in each successive month thereafter. Moreover, it reads into the statute a 12 month waiting period, which Congress did not impose and did not intend.

Even if the Commissioner's interpretation allows a claimant already approved for benefits to retain those benefits if he returns to work within 12 months of onset, that result would be unfair and arbitrary with respect to those claimants, like Walton, whose disability is not finally adjudicated within 12 months of onset. They are treated differently for the sole reason that Social Security did not adjudicate their case in a timely manner. As the Fourth Circuit noted, neither § 423 (a)(1) nor § 423(d) mentions adjudication as a prerequisite to disability or entitlement to disability benefits. App. 13a. Similarly, the Sixth Circuit in Salamalekis refused to make the award of benefits, a factor dependent upon the agency's conduct, an additional prerequisite to trial work eligibility, finding such a prerequisite to be contrary to Congress' unambiguous intent. 221

F.3d at 833-4. The Hunter Court also recognized the inequity of making an award of benefits or a trial work period contingent upon agency action: "The point at which the Secretary comes to acknowledge the existence of a disability is not and should not be a consequential factor in the calculus of entitlement, let alone a determinative one." Hunter, supra, 851 F.Supp. at 77.

Finding that a trial work period is available despite a return to work within 12 months of onset is not, as the Commissioner suggests (Petition 23, fn 8), in conflict with the holding of Cieutat v. Bowen, 824 F.2d 348 (5th Cir. 1987). That case held only that a trial work period cannot begin prior to filing an application for benefits. Id. at 359. Walton's trial work period did not begin until after his application for benefits and therefore his position in no way conflicts with the Cieutat holding.

Because the Commissioner's interpretation of the statute and regulations is inconsistent with the plain language of the Act, this Court should not defer to the Agency's interpretation. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S.Ct. 2778, 2781 (1984). The Fourth Circuit in its decision recognized Chevron deference where it is due, but concluded that in this case no deference was due: "In the first place, agency interpretation of the Act is

not appropriate because the language of the statute is clear and unambiguous. Moreover, even if interpretation were required, the Commissioner's interpretation—which assumes either a duration period or adjudication requirement and does violence to the grammatical structure of the statute—conflicts with the very statute it purports to elucidate. We are bound to reject such constructions." App. 6a-7a. Similarly, the Sixth Circuit in Salamalekis concluded that no deference was due: "Here, however, no deference is due because we find SSR 82-52, and the agency's position in this case, to contradict the plain language of the governing statute, 42 U.S.C. § 422 (c)." 221 F.3d at 832.

The lengthy list of cases rejecting SSR 82-52[8] demonstrates that the courts, while explicitly recognizing the deference due the Agency, have repeatedly concluded that no deference was due in this instance because the Agency's position is contrary to the express language of the statute and regulations. The Newton court certainly recognized the deference often due an agency's interpretation of its own regulations but nevertheless rejected the Agency policy of SSR 82-52. "While courts must give deference to an agency's interpretation of its

[8] The Agency's March 6, 1995 Notice of Proposed Rulemaking ("NPRM") is merely a restatement of the policy of SSR 82-52. "These revisions . . . do not represent a change in policy . . . ." 60 Fed. Reg. 12166, 12168 (March 6, 1995). There is nothing in the NPRM to suggest that those courts which rejected the policy of SSR 82-52 would rule any differently when considering the very same policy as explained anew in the NPRM. Both the Fourth Circuit in this case and the Salamalekis court considered the NPRM and still rejected the agency policy reflected therein.

own regulations, courts are not bound by them and they are not conclusive . . . . The agency ruling, SSR 82-52, is inconsistent with the statutory provision governing the start of the trial work period." Newton, supra, 92 F.3d at 693-4. Likewise, the court concluded in Hunter, supra, 851 F.Supp. at 77, that "On its face, S.S.R. 82-52 contradicts the plain language of the Social Security Act's definition of 'disability.' More importantly, S.S.R. 82-52 undercuts, if it does not nullify, the Act's 'trial work period' policy, which seeks to encourage the disabled to return to work as soon as possible . . . ." Similarly, the Fabel court recognized the level of deference due the Agency's interpretation of the statute but nonetheless concluded: "Despite this level of deference, the Court finds the SSR 82-52 is plainly erroneous and inconsistent with the Act." Fabel, supra, 891 F.Supp. at 206. The Tenth Circuit in Walker, supra, 943 F.2d at 1260, also recognized the deference due the Agency but nonetheless rejected its policy and its failure to apply the ruling of McDonald nationwide: "In our view, the Social Security Administration's rejection of the Seventh Circuit's position in McDonald is inconsistent with the language of the Act and, therefore, Acquiescence Ruling 88-3(7) is entitled to no deference."

CONCLUSION

The Petition for a Writ of Certiorari should be denied. In marked contrast to the circumstances under which this Court granted certiorari in Bowen v. Yuckert, 482 U.S. 137 (1987), there is no difference of opinion among the courts of appeals regarding entitlement to a trial work period under the facts of this case. In Yuckert, nearly all of the circuits had considered the validity of the severity regulation and the courts of appeals had split nearly evenly on the question of the regulation's validity. Id. at 145, fn 4, 155 fn 1, 2. In the instant case, however, five courts of appeals have considered the question of when a trial work period is available and five courts of appeals have ruled consistently and without variation or even a dissenting opinion, all concluding that a trial work period is available to a claimant with a severe impairment which has lasted or is expected to last 12 months, even if the claimant returns to substantial gainful activity within 12 months of onset. Because there is no conflict among the circuits, there is no need for this Court's guidance on this issue and therefore no need for this Court to grant certiorari.

The fact that the Commissioner's policy is of longstanding duration provides no compelling reason to accept this case for review. During the several decades that Social Security has implemented this policy, it has been repeatedly advised by court after court (See pages 18-22, infra) that its' policy was contrary to the

explicit language of the statutes governing entitlement to benefits and governing entitlement to a trial work period. The fact that the Commissioner has chosen to ignore scores of court rulings throughout the nation and has chosen to continue to implement its flawed policy outside the Seventh, Tenth, Eighth, and Sixth Circuits only underscores the need for finality here. By refusing to grant a writ of certiorari in this case, this Court could send a message to Social Security that the decisions of those circuits must stand and that the decision of the Fourth Circuit Court of Appeals must be applied throughout the circuit. Denial of this certiorari petition will also allow Cleveland Walton to finally reach some closure on this case which has been ongoing in one forum or another for more than six years.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 00-1937

In the Supreme Court of the United States

LARRY G. MASSANARI,
ACTING COMMISSIONER OF SOCIAL SECURITY,
PETITIONER

v.

CLEVELAND B. WALTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent does not dispute that the decision below squarely conflicts with decisions of the Eighth and Tenth Circuits on the first question presented. Nor does respondent seriously dispute the decision's enormous fiscal and programmatic consequences for Social Security. Instead, respondent devotes most of his brief to defending the court of appeals' decision on the merits. That defense, however, is unpersuasive, does not undermine the decision's significance, and does not decrease the need for this Court's review.

A. 1. The first question presented is whether a claimant is entitled to disability benefits under the Social Security Act (Act), 42 U.S.C. 301 *et seq.*, if, at the time his claim for benefits is adjudicated, it is known that his disability (*i.e.*, the inability to engage in substantial gainful activity on account of a medical impairment) neither lasted nor can be expected to last for 12 consecutive months. Invalidating the Commissioner's longstanding construction of the Act, the court of appeals held that the Act does not require—and indeed precludes the Commissioner from requiring—that the *disability* last or be expected to last at least 12 months. Pet. App. 7a-

8a, 10a-11a. Instead, the court held, only the *impairment* that gives rise to the inability to work need last or be expected to last for 12 months. *Id.* at 8a, 11a.

As the petition explains (Pet. 15-17), the Tenth and Eighth Circuits have reached precisely the opposite conclusion. In *Alexander* v. *Richardson*, 451 F.2d 1185 (1971), cert. denied, 407 U.S. 911 (1972), the Tenth Circuit held that an individual is not entitled to disability benefits unless *both* the inability to engage in substantial gainful activity and the impairment giving rise to that inability last 12 months. *Id.* at 1186 ("Inability to engage in any gainful activity and the impairment which causes it cannot be separated. The two components of disability must exist at the same time."). Even where an impairment is permanent, that court held, the claimant "is not entitled to benefits" if "he is able to engage in any gainful activities within a year from his injury." *Ibid.* The Eighth Circuit followed *Alexander* in *Titus* v. *Sullivan*, 4 F.3d 590, 594-595 (1993).

Seeking to minimize the significance of that conflict, respondent relies (Br. in Opp. 8-9) on *Newton* v. *Chater*, 92 F.3d 688, 694 (8th Cir. 1996), and *Walker* v. *Secretary of Health & Human Services*, 943 F.2d 1257, 1260 (10th Cir. 1991). Neither *Newton* nor *Walker*, however, addressed whether the disability or merely the underlying impairment must last or be expected to last 12 months; and neither purported to overrule *Alexander* or *Titus*. Instead, *Newton* and *Chater* addressed the validity of the Secretary's trial work regulations, which are at issue in the second question presented. See pp. 8-10, *infra*; Pet. 23-26. Indeed, in both cases, the applicant's disability—his inability to work on account of his impairment—actually lasted 12 months, as respondent concedes. Br. in Opp. 8 (in both cases "the claimant's return to work actually occurred more than 12 months after onset"); see *Walker*, 943 F.2d at 1258; *Newton*, 92 F.3d at 690. Thus, neither case dealt with whether a claimant is entitled to benefits where, as here, he returns to work within

12 months of the alleged disability's onset and before his claim is adjudicated. In fact, *Newton* expressly recognized (contrary to the decision below) that the *disability*, and not merely the underlying medical impairment, must last 12 months. The payment of benefits, the court stated, is "conditioned * * * upon the passage of five consecutive months of [a] *disability lasting twelve continuous months*." *Newton*, 92 F.3d at 694 (emphasis added).

2. The court of appeals' interpretation of the Act not only creates a circuit conflict, but also would, if allowed to stand, have enormous fiscal and administrative consequences. As the petition explains (at 18), the Commissioner's actuaries estimate that the cost of complying with the Fourth Circuit's decision would be approximately $9.8 billion over the next 10 years. By dramatically relaxing a core requirement for showing disability, moreover, the court of appeals' decision invites a substantial increase in the number of applications the Commissioner must process, which already exceed 2 million annually.[1] Although respondent complains that the financial projections are based on the assumption that beneficiaries would receive benefits indefinitely, that is not true; the estimates account for the average duration of a benefits award. Besides, an assumption that beneficiaries would receive benefits indefinitely is hardly unjustified. The Commissioner's authority to terminate benefits for "medical improvement" under 42 U.S.C. 423(f)(1) is greatly circumscribed by the court of appeals' decision. Where an individual already could work notwithstanding his impairment by

[1] The Commissioner's estimates may prove conservative because they do not attempt to account for the increase in applications that would be caused by the court of appeals' decision. See Pet. 18 n.5. Respondent maintains that claimants will not decide whether to apply for benefits based on a court decision. Br. in Opp. 14. But the number of applications the Social Security Administration (SSA) receives is directly linked to the number of people who qualify for benefits. By relaxing the requirements for disability benefits, the court of appeals necessarily increased the number of applications SSA must process.

the time the award is made, it would often prove difficult if not impossible to show further "medical improvement" to justify termination. See Pet. 19.

3. Unable to contest the existence of a circuit conflict or the fiscal significance of the decision below, respondent primarily argues that the decision is correct and that the Eighth and Tenth Circuits' contrary decisions in *Titus* and *Alexander* are not. The latter decisions, respondent asserts, "blur[] the distinction between the duration requirement and the severity requirement." Br. in Opp. 7. Echoing the analysis of the court of appeals, respondent argues that the phrase "which has lasted or can be expected to last for a continuous period of not less than 12 months" in 42 U.S.C. 423(d)(1)(A) must modify the word "impairment," not the phrase "inability to engage in any substantial gainful activity." Br. in Opp. 4; see also Pet. App. 7a-8a, 10a-11a. But that grammatical parsing of the statute hardly demonstrates *Alexander* and *Titus* to be incorrect, or the Commissioner's construction to be impermissible. To the contrary, respondent's construction ignores the fact that the definition of "disability" requires not only an underlying medical impairment that has lasted or can be expected to last for at least 12 months, but also an inability to engage in substantial gainful activity "by reason of" that impairment. 42 U.S.C. 423(d)(1)(A). The inability to work and the impairment giving rise to it thus are directly linked; it follows logically that their durations are linked as well. Indeed, when Congress amended the definition of disability by adding 42 U.S.C. 423(d)(2)(A) in 1967, it declared that an individual is "under a disability" and entitled to benefits "only if" his impairment is "of such severity" that it precludes all substantial gainful activity in the national economy. Respondent offers no reason why that severity requirement, which

is a condition precedent to the finding of disability, does not apply in each of the required 12 months of impairment.[2]

The Commissioner's construction, moreover, is fully consistent with respondent's grammatical parsing. After all, if one accepts that the phrase "which has lasted or can be expected to last for a continuous period of not less than 12 months" describes *only* the duration of the *impairment*, then the statute is at most silent or ambiguous regarding the duration of the inability to engage in substantial gainful activity that the impairment must produce. Thus, Congress has left a gap for the Commissioner to fill, and the Commissioner has reasonably determined that the disability should be durationally coextensive with the impairment. See 65 Fed. Reg. 42,774 (2000); Social Security Ruling (S.S.R.) 73-7c (Cum. Bull. 1973). That decision must be upheld under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), so long as it is permissible, as respondent concedes.[3] Here, the Commissioner's con-

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[2] Respondent cites regulations and legislative history that distinguish between the "severity requirement" and the "duration requirement." Br. in Opp. 7. There is, of course, a distinction between *how severe* an impairment must be (sufficiently severe to preclude all substantial gainful activity) and *how long* the impairment and resulting inability to work must last. The materials respondent cites are fully consistent with the Commissioner's view that both the impairment and the resulting disability must last at least 12 months.

[3] Respondent does not dispute that, if the Commissioner's construction is permissible, it must be upheld under *Chevron*; he merely disputes whether that construction is permissible. See Br. in Opp. 29-30. At the same time, however, respondent suggests that the Commissioner's current regulations are irrelevant because they were promulgated after the Administrative Law Judge resolved his claim. Br. in Opp. 5 n.1, 30 n.8. Respondent nowhere explains why that should make a difference where, as here, these new regulations—which are entitled to deference no matter when they were promulgated—merely restate the Commissioner's longstanding interpretation, see 65 Fed. Reg. at 42,774 (revisions "do not represent a change" and are "consistent with SSR 82-52"), and that interpretation is embodied in the Commissioner's final decision in the adjudication of respondent's case.

struction is clearly permissible: Nothing in the Act declares that there is no minimum duration requirement for the inability to work, and the Act's legislative history shows that Congress specifically intended to require that the *disability*—which is defined as the inability to work on account of the impairment—last or be expected to last at least 12 consecutive months. S. Rep. No. 404, 89th Cong., 1st Sess. 99 (1965) (benefits payable only if the claimant "has been or can be expected to be *totally disabled throughout a continuous period of 12 calendar months*" (emphasis added)); *ibid.* (benefits payable where the "*disability* has existed for 12 calendar months" or "the worker's *disability* will continue for a total of at least 12 calendar months" (emphasis added)). See also Pet. 21-22.

For similar reasons, respondent's reading contravenes Congress's intent because it converts Social Security into precisely the sort of short-term disability program Congress sought to avoid. See Pet. 21. Respondent attempts to answer that point by relying on the five-month waiting period under 42 U.S.C. 423(c)(2)(A). Br. in Opp. 11, 17-18. But Section 423(c)(2)(A) does not help respondent. That waiting period applies only to Title II's disability insurance program, and not to Title XVI's Supplemental Security Income (SSI) program, which uses the same definition of disability. See Pet. 5, 19. Consequently, under the court of appeals' decision, the Commissioner apparently must pay SSI benefits if an impairment of indefinite duration causes an inability to work of as little as a month. Congress could not have intended such a result.[4] Further, Congress clearly concluded

[4] Respondent suggests that the SSI program should not require an inability to work of *any* duration, citing regulations that permit disabled individuals to receive SSI benefits despite working. Br. in Opp. 12. Those regulations, however, say nothing about a waiting period, and apply only *after* the applicant has met the definition of "disability" through a 12-month inability to work, or a determination that the individual can be expected to be unable to work for 12 months. The regulations nowhere suggest that an individual may qualify for SSI benefits on account of a disability even if he returned to work *before* the 12-month period lapsed and *before* his claim was adjudicated. Respondent's further contention that Title XVI benefits are not at issue here, *id.* at 12 n.3, is also incorrect. Respondent sought benefits under both Title II and Title XVI, Pet. App. 39a, 52a; Resp. C.A. Br. 1, and the court of appeals understood both Title II and Title XVI benefits to be at issue, see Pet. App. 2a. More important, even if Title XVI benefits were not at issue in this case, respondent's and the court of appeals' construction of "disability" applies with equal force to that program, since Title II and Title XVI use the same definition of disability.

in 1965, when it enacted the current definition of disability in 42 U.S.C. 423(d)(1)(A), that even a six-month inability to work was the sort of short-term disability that should not qualify for benefits. See Pet. 21. Respondent's reliance on the five-month waiting period as sufficient protection for the program is inconsistent with that judgment.

In any event, respondent misconstrues the purpose of the five-month waiting period. Section 423(c)(2)(A) does not address whether an individual suffers from a disability of sufficient severity or duration to entitle him to benefits. Instead, it addresses the time at which *payments must begin* for a disability that qualifies under the Act. The waiting period is a cost-saving device predicated on the principle that, even with respect to a covered disability of 12 months or more, workers ought to rely on a source of protection other than Social Security disability insurance during the first five months of disability. Indeed, when Congress shortened the waiting period from six months to five in 1972, it recognized that that change would not alter the requirement that the *disability*—the inability to work on account of the medical impairment—last or be expected to last for at least 12 months. As the House Report explained, notwithstanding the one-month decrease in the waiting period, "[n]o benefit is payable * * * unless the *disability* is expected to last (or has lasted) *at least 12 consecutive months* or to result in

death." H.R. Rep. No. 231, 92d Cong., 1st Sess. 56 (1971) (emphasis added).[5]

B. Respondent devotes the bulk of his brief to the second question presented, see Br. in Opp. 8-10, 15-31, which is whether he was entitled to a trial work period. As the petition concedes (Pet. 26 n.10), the Commissioner's trial work regulations have not fared well in the courts of appeals. Seizing on that concession, respondent urges that review is unnecessary because the courts of appeals are in substantial agreement on the second question presented.

Respondent's contention, however, in no way undermines the need for review in this case because there concededly is a circuit conflict on the first question presented, which has enormous fiscal implications for the Social Security disability program. Moreover, the second question is closely interrelated with the first and the two warrant resolution together. Indeed, in this case, the court of appeals' resolution of the second question was a product of its decision on the first. As that court acknowledged, its conclusion that respondent was entitled to a trial work period was "conclusively settled" by its earlier conclusion that respondent was "disabled" and entitled to benefits notwithstanding his return to work within 12 months of the alleged disability's onset. Pet. App. 9a; Pet. 23 & n.8. That follows as a matter of logic as well. Under the Act, the right to a trial work period attaches only *if* the claimant is entitled to benefits. Pet. App. 9a. If the

[5] Respondent suggests that his interpretation "eliminate[s] short-term, transient disabilities" because "[s]ome impairments" will "never" prevent work while "other impairments" would "never" be expected to last 12 months. Br. in Opp. 11. But respondent ignores the large number of people who have *long-term* impairments that cause them to be unable to work for periods of less than twelve months. See, *e.g.*, *Alexander*, 451 F.2d at 1186 (example of individual who loses a hand). Indeed, many extremely common ailments (back injuries, etc.) may last a lifetime, but are debilitating only for short or intermittent periods. Under respondent's construction, such short-term disabilities would be compensable merely because the underlying impairment persists indefinitely.

individual's return to work within 12 months of the alleged disability's onset prevents him from being entitled to benefits, it necessarily prevents him from being entitled to a trial work period as well.[6] For that reason, respondent's reliance (Br. in Opp. 18-19) on the Eighth and Tenth Circuits' decisions in *Walker* and *Newton* is misplaced, even with respect to the trial work issue. In each of those cases, the individual was unable to work for a period of 12 full months. See pp. 2-3, *supra*. They do not hold that an individual like respondent, who returned to substantial gainful activity in less than 12 months and before his claim was adjudicated, is "entitled" to benefits and thus to a trial work period as well.

In any event, respondent's defense of the court of appeals' decision on this issue is unpersuasive. Respondent's primary contention is that, under the Commissioner's rule, whether or not a particular applicant is entitled to benefits may depend in part on when the claim is adjudicated. Br. in Opp. 28. But that is a necessary consequence of Congress's decision to accommodate two distinct goals: (1) that the disability programs should not result in the payment of benefits in cases of short-term, temporary disability, and (2) that claimants whose impairments will prevent them from engaging in substantial gainful activity for at least a year should not be required to wait a full year before they can receive

[6] The court of appeals' decision on the second question would conflict with *Cieutat* v. *Bowen*, 824 F.2d 348 (5th Cir. 1987), even if the issues were wholly independent of each other. See Pet. 23 n.8. Although respondent characterizes *Cieutat* as holding only that trial work could not occur before the application for benefits was filed, Br. in Opp. 29, that is incorrect. The Fifth Circuit held that, under the Act, services rendered during a period of trial work shall be deemed not to have been performed by an individual "in determining whether his disability"—once established—"has *ceased*." 42 U.S. 422(c)(2) (emphasis added); 824 F.2d at 358-359. The Fifth Circuit thus emphasized that work done "after the alleged onset of disability" *can* be used to determine whether the claimant "ever became disabled" or "established an entitlement to benefits" in the first place. 824 F.2d at 358-359.

benefits. Congress sought to meet those goals by requiring that the disability *has lasted* or *can be expected to last* for at least 12 months. The Commissioner has reasonably construed the Act as requiring the adjudicator to resolve that issue based on the evidence available *at the time of the disability determination.* Where the disability determination takes place within 12 months of the alleged disability's onset, and the evidence shows that the impairment currently prevents substantial gainful activity, the adjudicator necessarily must make a prediction about the disability's expected duration. That prediction in some instances may prove wrong. But where the evidence shows, at the time of the adjudication, that the individual has *already* returned to substantial gainful activity, and did so within 12 months of the alleged disability's onset, there is no reason why the adjudicator should be precluded from relying on that fact as conclusive proof that the disability did not last (and thus cannot be expected to last) 12 months. Indeed, such evidence is routinely considered in other legal contexts. For example, if a plaintiff suing in tort for lost prospective wages returned to work before trial, the jury could take such post-injury conduct into account even though that evidence would not have been available had the trial taken place earlier. Similarly, there is no reason why the Commissioner should be barred from taking an applicant's return to work into account when determining whether the applicant is or was under a disability that has lasted or can be expected to last 12 months.

* * * * *

For the reasons stated above, and in the petition for a writ of certiorari, it is respectfully submitted that the petition should be granted.

THEODORE B. OLSON
Solicitor General

JULY 2001

FILED
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No. 00-1937

In the Supreme Court of the United States

JOANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CLEVELAND B. WALTON, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: JUNE 27, 2001
CERTIORARI GRANTED: SEPT. 25, 2001

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(RICHMOND)

No. 98-CV-339

CLEVELAND B. WALTON, PLAINTIFF

v.

KENNETH S. APFEL, COMMISSIONER OF
SOCIAL SECURITY, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
6/5/98	1	COMPLAINT Filing Fee $ 150.00 Receipt # 46999 (scoo) [Entry date 06/08/98]
6/8/98	—	SUMMONS(ES) issued for Kenneth S. Apfel, U.S. Atty and Atty General picked up by counsel (scoo)
6/12/98	2	SUMMONS Returned Executed as to Kenneth S. Apfel 6/9/98. Answer due on 6/29/98 for Kenneth S. Apfel (lsal)

DATE	DOCKET NUMBER	PROCEEDINGS
8/5/98	3	ANSWER to Complaint by Kenneth S. Apfel (Attorney Debra Jean Prillaman), with large transcript (jpar)
8/18/98	4	ORDER plaintiff file his motion for summary judgment with brief in support thereof w/in 30 days from the date hereof; defendant file his motion for summary judgment with brief in support thereof including his response to plaintiff's motion for summary judgment w/in 60 days from the date hereof (signed by Magistrate Judge G. W. Downs) Copies Mailed: yes. (lsal)
9/10/98	5	MOTION by Cleveland B. Walton for Summary Judgment (adoh)
9/10/98	6	MEMORANDUM by Cleveland B. Walton in support of [5-1] motion by Cleveland B. Walton for Summary Judgment (adoh)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
2/5/99	19	MOTION by Kenneth S. Apfel for Summary Judgment (lsal)
2/5/99	20	MEMORANDUM by Kenneth S. Apfel in support of [19-1] motion by Kenneth S. Apfel for Summary Judgment (lsal)
2/12/99	21	REPLY by Cleveland B. Walton to response to [5-1] motion by Cleveland B. Walton for Summary Judgment; and in opposition to [19-1] motion by Kenneth S. Apfel for Summary Judgment (lsal)
4/14/99	22	PROPOSED MEMORANDUM OPINION (signed by Magistrate Judge G. W. Downs) Copies Mailed: yes. (lsal)

DATE	DOCKET NUMBER	PROCEEDINGS
4/14/99	23	ORDER the Proposed Memorandum Opinion is FILED; all parties may file objections w/in 12 days. (signed by Magistrate Judge G. W. Downs) Copies Mailed: yes. (lsal)
4/23/99	24	OBJECTIONS by plaintiff Cleveland B. Walton to [22-1] Proposed Memorandum Opinion and [23-1] order of U.S. Magistrate Judge Downs (lsal)
5/4/99	25	Response by Kenneth S. Apfel to [24-1] objection by Cleveland B. Walton to the Report and Recommendations of Magistrate Judge Downs entered 04/14/99. (lsal) [Entry date 05/05/99]
10/26/99	26	MEMORANDUM OPINION (signed by Judge Robert E. Payne) Copies Mailed: yes. (lsal) [Entry date 10/27/99]

DATE	DOCKET NUMBER	PROCEEDINGS
10/26/99	27	ORDER the proposed Memorandum Opinion is affirmed and shall constitute the final decision of this Court (signed by Judge Robert E. Payne) Copies Mailed: yes. [EOD Date: 10/27/99] (lsal) [Entry date 10/27/99]
10/27/99	28	JUDGMENT entered by the Clerk, pursuant to Rule 58 and in accordance with the Final Order entered 10/26/99. Copies Mailed: yes. [EOD DATE: 10/27/99] (lsal)
		* * * * *
12/20/99	29	NOTICE OF APPEAL OF [26-1] Memorandum Opinion, [27-1] order by Cleveland B. Walton. No Fee Paid. TPO package mailed to plaintiff's attorney. (lsal)
12/20/99	30	MOTION by Cleveland B. Walton to Proceed in Forma Pauperis On Appeal (lsal)

DATE	DOCKET NUMBER	PROCEEDINGS
12/21/99	31	ORDER granting [30-1] motion by Cleveland B. Walton to Proceed In Forma Pauperis On Appeal. It is ORDERED that the appeal be filed without payment of any fees or costs, and that plaintiff may have the benefit of service of process without payment of any fees or costs (signed by Judge Robert E. Payne) Copies Mailed: yes. [EOD Date: 12/21/99] (lsal)
1/5/00	—	LETTER from Fourth Circuit Court of Appeals in re: transmitting a certificate to the USCA. (lsal)
1/5/00	—	USCA Case Number Re: CASE MANAGER: Cynthia W. Carter; USCA NUMBER: 00-1016 (lsal)
1/10/00	32	Certification of completion sent to USCA re: [29-1] appeal by Cleveland B. Walton (jpea)

DATE	DOCKET NUMBER	PROCEEDINGS
12/18/00	33	Opinion of USCA re: [29-1] appeal by Cleveland B. Walton AFFIRMED in part, REVERSED in part, and REMANDED by published opinion (jlil) [Entry date 12/19/00]
2/2/01	—	USCA LETTER that the time for filing a petition for rehearing has been extended. (khan)
2/15/01	—	USCA LETTER re: a timely petition for rehearing en banc has been filed (jlil)
2/27/01	34	USCA Order that the petition for rehearing and rehearing en banc is denied. (jlil) [Entry date 02/28/01]
3/7/01	35	JUDGMENT OF USCA (certified copy) Re: [29-1] appeal that in accordance with the written opinion of this Court filed this day, the Court affirms in part, reverses in part and remands the judgment of the District Court (jlil) [Entry date 03/08/01]

DATE	DOCKET NUMBER	PROCEEDINGS
3/19/01	36	ORDER that the counsel shall schedule a status telephone conference in this action to occur no later than 4/6/01; (signed by Judge Robert E. Payne) Copies Mailed: y (and to plaintiff) [EOD Date: 3/19/01] (thom) [Edit date 03/19/01]
3/20/01	—	Case reopened (See document #35) (thom)
4/3/01	37	ORDER that this case is remanded to the Commissioner of Social Security to issue a favorable decision finding Plaintiff disabled as of 10/31/94 and finding plaintiff entitled to a trial work period as stated in decision of USCA dated 12/18/00; upon remand, the Commissioner will calculate the benefits to which plaintiff is entitled consistent with decision of the USCA of the Fourth Circuit in this case (signed by Judge Robert E. Payne) Copies Mailed: [EOD Date: 4/3/01] (thom)

DATE	DOCKET NUMBER	PROCEEDINGS
4/3/01	—	Case closed (thom)
4/3/01	38	USCA Order that by Order dated 3/7/01 this Court granted appellant costs in the amount of $679.09; it has now come to the Court's attention that appellee had filed a timely objection to the bill of costs which was not addressed in this Court's Order; the Court vacates the order awarding costs and directs appellant to address appellee's objection to costs on or before 4/12/01; (thom)
7/6/01	—	USCA LETTER re: notice from Supreme Court that a petition for writ of certiorari has been filed. (thom) [Entry date 07/10/01]
10/11/01	—	USCA LETTER that a Supreme Court Order was filed on 9/25/01 granting certiorari (Supreme Court letter attached); (thom) [Entry date 10/15/01]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-01016

CLEVELAND B. WALTON, PLAINTIFF-APPELLANT

v.

KENNETH S. APFEL, COMMISSIONER OF
SOCIAL SECURITY, DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS
12/20/99	Counsel of record form filed by Kathryn Lee Pryor for Appellant Cleveland B. Walton. (cwc)
12/20/99	Docketing statement filed by Appellant Cleveland B. Walton [3113341-1] T/S needed [Y/N]: n T/S already on file?: n. [00-1016] (cwc)
1/4/00	Civil case docketed. (cwc)
1/4/00	Docketing notice issued. [00-1016] (cwc)
1/4/00	Briefing order filed. [00-1016] Appellant(s) brief/joint appendix due 2/14/00 for Cleveland B. Walton. (cwc)

DATE	PROCEEDINGS
1/6/00	Counsel of record form filed by Debra Jean Prillaman for Appellee Apfel, Commissioner. (cwc)
1/10/00	Certification of ROA complete and retained in the District Court. [00-1016] (cwc)
1/11/00	Counsel of record form filed by Eric P. Kressman for Appellee Apfel, Commissioner. (cwc)
2/9/00	Brief joint appendix filed by Appellant Cleveland B. Walton. Type of Service: HD Copies of brief: 4 # brf. pages: 76 Copies of apx: 4 # apx pages: 186 Sufficient?[Y/N]: y 2-sided copying: y [00-1016] Appellee brief due 3/10/00 for Apfel, Commissioner. (wtc)
3/10/00	Brief filed by Appellee Apfel, Commissioner. Type of Service: CD Copies: 8 # brf pages: 56. Sufficient [Y/N]: y. [00-1016] (rba)
3/24/00	Reply brief filed by Appellant Cleveland B. Walton. Type of Service: HD Copies of brief: 8 # brf pages: 37. Sufficient [Y/N]: y. . . [00-1016] (rba)

DATE	PROCEEDINGS
7/14/00	Case tentatively calendared for oral argument Session: 9/00 Place: Richmond. SUBMISSION DEADLINE: 7/24/00. (jc)
7/21/00	Motion filed by Appellee Apfel, Commissioner to continue oral argument. [3223069-1]. [00-1016] (saw)
7/21/00	ORDER FILED granting motion to continue oral argument [3223069-1] Argument continued until the week of 10/30/00 through 11/3/00. Copies to all counsel. [00-1016] (dsd)
8/18/00	Case tentatively calendared for oral argument Term: November Place: Richmond. SUBMISSION DEADLINE: August 28, 2000. (jle)
9/7/00	Case calendared for oral argument. [00-1016] (jc)
9/21/00	Supplemental authorities (FRAP 28(j)) filed by Appellee Apfel, Commissioner [3257003-1]. [00-1016] (rba)
9/27/00	Supplemental authorities (FRAP 28(j)) filed by Appellant Cleveland B. Walton [3260305-1]. [00-1016] (rba)

DATE	PROCEEDINGS
10/5/00	Motion filed by Appellee Apfel, Commissioner to present demonstrative evidence at oral argument [3264996-1]. [00-1016] (cwc)
10/16/00	Supplemental authorities (FRAP 28(j)) filed by Appellant Cleveland B. Walton [3269636-1]. [00-1016] (rba)
10/24/00	COURT ORDER filed granting motion for use of physical exhibit [3264996-1] Copies to all counsel. [00-1016] (cwc)
10/30/00	Oral argument heard. Courtroom Deputy: JLC, Jr. [00-1016] (jc)
12/18/00	Published, authored opinion filed. [00-1016] (bhr)
12/18/00	Judgment order filed. Decision: affirmed in part, reversed in part and remanded. EOD Date: 12/18/00. [00-1016] (bhr)
1/3/01	Bill of costs filed by appellant. [3309653-1] [00-1016] (cwc)
1/11/01	Response in opposition of appellant's bill of costs filed [3314688-1] by Appellee Apfel, Commissioner to bill costs [3309653-1] [00-1016] (cwc)

DATE	PROCEEDINGS
1/22/01	Motion filed by Appellee Apfel, Commissioner to extend time to file petition for rehearing [3320112-1]. [00-1016] (cwc)
1/22/01	Counsel of record form filed by Mark Simon Davies for Appellee Apfel, Commissioner. (cwc)
1/22/01	Counsel of record form filed by John Crawford Hoyle for Appellee Apfel, Commissioner. (cwc)
2/1/01	COURT ORDER filed granting motion to extend time to file pet reh until 2/15/01 [3320112-1] Copies to all counsel. [00-1016] (cwc)
2/7/01	CORRECTED Court order filed granting appellee's motion to extend time to file pet reh [3320112-1] Copies to all counsel. [00-1016] (cwc)
2/15/01	Petition filed by Appellee for rehearing. Number copies filed: 20 [3335566-1]., for rehearing en banc. Number of copies filed: 20 [3335566-2] [00-1016] (cwc)
2/21/01	Federal Reporter Citation: 235 F.3d 184. [00-1016] (vsl)

DATE	PROCEEDINGS
2/27/01	COURT ORDER filed denying motion for rehearing [3335566-1] EOD Date: 2/27/01, denying motion for rehearing en banc [3335566-2] EOD Date: 2/27/01. Copies to all counsel. [00-1016] (cwc)
3/7/01	ORDER FILED awarding costs in the amount of $ 679.09. Copies to all counsel. [00-1016] (cwc)
3/7/01	Mandate issued. [00-1016] (cwc)
4/2/01	ORDER FILED to vacate order of 3/7/01 and directing appellant to address appellee's objection to costs on or before 4/12/01. [3362928-1]. Copies to all counsel. [00-1016] (cwc)
5/2/01	Memorandum in support of appellant's bill of costs filed by Appellant [3380594-1]. [00-1016] (cwc)
5/3/01	ORDER FILED denying costs. Copies to all counsel. [00-1016] (cwc)
5/23/01	Supreme Court notice that an extension of time to file a petition for rehearing has been granted until 06/27/01. [00-1016] (jh)

DATE	PROCEEDINGS
7/3/01	Supreme Court notice that petition for certiorari was filed on 06/27/01. Spct No.: 00-1937 Spct Pty 1: Larry G. Massanri Spct Pty 2: Cleveland B. Walton. [00-1016] (jh)
10/11/01	Supreme Court order received granting petition certiorari [3417432-1] on 09/25/01. [00-1016] (jh)

Supreme Court, U.S.
FILED
NOV 21 2001
CLERK

(4)

No. 00-1937

In the Supreme Court of the United States

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CLEVELAND B. WALTON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

Title II and Title XVI of the Social Security Act define "disability" as the inability to "engage in any substantial gainful activity by reason of any * * * impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A); 42 U.S.C. 1382c(a)(3)(A) (1994 & Supp. V 1999). Under Title II, once a claimant is entitled to disability benefits, the claimant may engage in substantial gainful activity during a "trial work period" of up to nine months without that work activity being considered in determining whether his disability has ceased. 42 U.S.C. 422(c). The questions presented are:

1. Whether a claimant is entitled to disability benefits under Titles II or XVI of the Social Security Act if he has a physical or mental impairment that has lasted or can be expected to last for at least 12 months, but his inability to engage in substantial gainful activity by reason of that impairment has not lasted and cannot be expected to last for 12 months.

2. Whether a claimant is entitled to disability insurance benefits and a "trial work period" under Title II even though, at the time his disability benefits claim is adjudicated, the evidence shows that his impairment no longer prevents him from performing substantial gainful activity and that it did not do so for 12 continuous months.

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In the Supreme Court of the United States

No. 00-1937

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CLEVELAND B. WALTON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 235 F.3d 184. The opinion and judgment of the district court (Pet. App. 15a-26a, 27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2000. A petition for rehearing was denied on February 27, 2001 (Pet. App. 62a). On May 21, 2001, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 27, 2001. The petition was filed on June 27, 2001, and was granted on September 25, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Social Security Act, 42 U.S.C. 301 *et seq.*, and the relevant regulations, 20 C.F.R. Pts. 404, 416, are set forth in the Appendix to the petition, Pet. App. 63a-104a.

STATEMENT

Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, provides disability insurance benefits to individuals suffering from a long-term disability, and Title XVI of the Act, 42 U.S.C. 1381 *et seq.*, provides for the payment of Supplemental Security Income (SSI) to such individuals if they satisfy financial need requirements. This case concerns whether the Commissioner of Social Security, when determining whether a claimant is entitled to disability benefits, may deny the claim because the claimant was capable of engaging in—and had in fact successfully engaged in—substantial gainful activity within 12 months of when his impairment first prevented him from performing substantial gainful activity.[1]

A. Statutory and Regulatory Framework

1. *Title II Disability Insurance Program.* As enacted in 1935, Title II of the Act provided old-age benefits for covered workers who retired at age 65, but made no provision for "a lower retirement age for those who are demonstrably retired" before age 65 "by reason of a permanent and total disability." H.R. Rep. No. 1189, 84th Cong., 1st Sess. 3 (1955). Because Congress concluded that covered workers "forced into retirement * * * prior to age 65" should also receive benefits, *id.* at 4, Congress amended the Act in 1956 to establish a system of disability benefits. See Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815.[2]

[1] Until 1995, the social security program was administered under the supervision of the Department of Health and Human Services (HHS). In 1994, Congress established the Social Security Administration as an agency independent of HHS and headed by the Commissioner of Social Security. See Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 106(d), 108 Stat. 1476. References in this brief to the Commissioner for periods prior to 1994 are to the Secretary of HHS, or to his predecessor, the Secretary of Health, Education, and Welfare.

[2] The 1956 amendments limited disability benefits to covered employees who were at least 50 years of age. In 1960, Congress eliminated that restriction. Social Security Amendments of 1960, Pub. L. No. 86-778, 74 Stat. 924. Congress concluded that the "need of younger disabled workers * * * for disability protection" may be "greater than that of older workers" because younger workers "are more likely to have families dependent upon them." H.R. Rep. No. 1799, 86th Cong., 2d Sess. 12 (1960).

Under the 1956 amendments, the Act defined "disability" as the inability to engage in "any substantial gainful activity" by reason of an "impairment which can be expected to result in death or to be of long-continued and indefinite duration." 42 U.S.C. 423(c)(2) (1958). In 1965, Congress revised that definition. "[E]xperience under the disability program" had "demonstrated [that] in the great majority of cases in which total disability continues for at least a year the disability is essentially permanent." S. Rep. No. 404, 89th Cong., 1st Sess., Pt. I, at 99 (1965). Accordingly, Congress replaced the "long-continued and indefinite duration" requirement of the original definition of "disability" with a 12-month duration requirement. See Social Security Amendments of 1965, Pub. L. No. 89-97, § 303(a)(1), 79 Stat. 366. Congress concluded that the new duration requirement would (like the old one) prevent the program from paying "disability benefits in cases of short-term, temporary disability." S. Rep. No. 404, *supra*, at 98. As a result of the 1965 amendments, the Act's basic definition now reads as follows:

> The term "disability" means—inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. 423(d)(1)(A).

The Act further provides that an individual "shall be determined to be under a disability *only if* his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any

other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A) (emphasis added). Congress added that provision to the Act in 1967. See Social Security Amendments of 1967, Pub. L. No. 90-248, § 158(b), 81 Stat. 868; *Bowen* v. *Yuckert*, 482 U.S. 137, 147-148 (1987). The addition responded to a Fourth Circuit decision, *Leftwich* v. *Gardner*, 377 F.2d 287 (1967), which had held that a claimant was under a disability even though he was working at a level that, according to the Secretary of Health, Education and Welfare, demonstrated an ability to engage in substantial gainful activity. H.R. Rep. No. 544, 90th Cong., 1st Sess. 29, 31 (1967). The new provision was found necessary "to reaffirm that an individual who does substantial gainful work despite an impairment or impairments that otherwise might be considered disabling is not disabled." S. Rep. No. 744, 90th Cong., 1st Sess. 49 (1967).

Title II also provides a "waiting period" during which a claimant, even if under a disability, is not entitled to disability insurance benefits. The "waiting period" is "the earliest period of five consecutive calendar months * * * throughout which the individual * * * has been under a disability." 42 U.S.C. 423(c)(2)(A). The 1956 amendments had imposed a 6-month waiting period. See 42 U.S.C. 423(c)(3) (1958). Congress reduced the waiting period to 5 months in 1972. See Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329. Reducing the waiting period did not alter the severity or duration requirements for a finding of disability. As before, "[n]o benefit is payable * * * unless the disability is expected to last (or has lasted) at least 12 consecutive months." H.R. Rep. No. 231, 92d Cong., 1st Sess. 56 (1971).

Finally, Title II provides a "trial work period" to encourage individuals receiving disability benefits to return to work when possible. See 42 U.S.C. 422(c), as added by the Social Security Amendments of 1960, Pub. L. No. 86-778, 74 Stat. 924. During the trial work period, a beneficiary may perform substantial gainful activity for up to nine months

(which need not be consecutive) without losing benefits. The "period of trial work" begins "with the month in which [the claimant] becomes entitled to disability insurance benefits." 42 U.S.C. 422(c)(3). The period ends after the beneficiary has performed services for nine months, or in the month in which the disability actually ceases, whichever is earlier. 42 U.S.C. 422(c)(4)(A) and (B). "[A]ny services rendered by an individual during a period of trial work" are "deemed not to have been rendered by such individual in determining whether his disability has ceased in a month during such period." 42 U.S.C. 422(c)(2); see also *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805 (1999).

2. *Title XVI Supplemental Security Income Program.* Congress enacted Title XVI of the Act in 1972 to provide income to financially needy persons who are aged, blind, or disabled. See Social Security Amendments of 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1465, 42 U.S.C. 1381 *et seq.* Unlike Title II, which is an insurance program, the SSI program is a welfare program based on financial need. *Yuckert*, 482 U.S. at 140. The definitions of disability under Title XVI, 42 U.S.C. 1382c(a)(3)(A) (1994 & Supp. V 1999); 42 U.S.C. 1382c(a)(3)(B), are essentially identical to those under the Title II disability program, 42 U.S.C. 423(d)(1)(A) and (2)(A).

The Title XVI SSI program, unlike the Title II disability insurance program, does not have a waiting period. Instead, benefits are paid to qualifying disabled individuals beginning with the first month after the month in which an application is filed. The Title XVI SSI program also does not provide a "trial work period." Rather, it offers a number of "work incentives." See Employment Opportunities for Disabled Americans Act of 1986, Pub. L. No. 99-643, § 4, 100 Stat. 3575 (amending 42 U.S.C. 1382c to eliminate trial work period).

3. *Regulatory Implementation.* The Social Security Act provides that the initial determination of whether a claimant is disabled may be made by a state agency "acting under the authority and supervision of" the Commissioner. *Yuckert*,

482 U.S. at 142; see 42 U.S.C. 421(a), 421(c), 1383b(a).[3] If the state agency determines that the claimant is not disabled, the claimant may obtain a formal hearing before an Administrative Law Judge (ALJ) in the Social Security Administration (SSA), and may obtain review of an adverse decision by SSA's Appeals Council. 42 U.S.C. 405(b); 20 C.F.R. 404.929 (2000); *Sims* v. *Apfel*, 530 U.S. 103, 105 (2000). A state agency's initial determination of disability must be made "in accordance with * * * the standards and criteria contained in regulations or other written guidelines of the Commissioner of Social Security." 42 U.S.C. 421(a)(1) and (2).

a. *Disability.* The Commissioner, by regulation and in instructions issued to state agencies pursuant to 42 U.S.C. 421(a)(1), has for more than four decades interpreted the Act as precluding an award of disability benefits unless both the claimant's impairment and his inability to engage in substantial gainful activity by reason of the impairment have lasted or can be expected to last for at least 12 consecutive months. Thus, it is not enough that an individual's underlying medical *impairment* has lasted or can be expected to last, at some discernible level, for 12 months. Instead, the impairment must last or be expected to last at a sufficient level of *severity* to render the individual disabled—*i.e.*, to render him unable to engage in substantial gainful activity—for at least 12 months. See, *e.g.*, 20 C.F.R. 404.1501(f) (1960) (duration requirement not met if, within the foreseeable future, "the impairment will * * * be so diminished as no longer to prevent substantial gainful activity."); 20 C.F.R. 404.1502(f) (1961) (same); Social Security Ruling (SSR) 73-7c, at 122-123 (Cum. ed. 1971-1975) ("The two components of disability"—the impairment and the inability to engage in substantial

[3] If a State does not assume responsibility for making initial eligibility determinations, the Commissioner must make those determinations. 42 U.S.C. 421(b).

gainful activity by reason of the impairment—"must exist at the same time.").

Following notice-and-comment rulemaking, the Commissioner last year reaffirmed that "longstanding" construction. Determining Disability and Blindness; Substantial Gainful Activity Guides, 65 Fed. Reg. 42,772, 42,774 (2000); see also Notice of Proposed Rulemaking, 60 Fed. Reg. 12,166 (1995). The Commissioner explained that "the duration requirement to establish disability will not be met and a disability claim will be denied" if, "within 12 months after the onset of an impairment which prevented substantial gainful activity and before [the agency] ha[s] issued any notice of determination or decision finding disability, the impairment no longer prevents substantial gainful activity." 65 Fed. Reg. at 42,774. The Commissioner's regulations similarly declare that, when the claimant is "working and the work [he is] doing is substantial gainful activity," the agency "will find that [the claimant is] not disabled regardless of [his] medical condition or [his] age, education, and work experience." 20 C.F.R. 404.1520(b) (2000); see also 20 C.F.R. 404.1520(f), 404.1571.[4]

The determination whether a disability "has lasted or can be expected to last for * * * not less than 12 months" is made in light of the evidence available at the time the state agency, ALJ, or Appeals Council adjudicates the claim. See 65 Fed. Reg. at 42,780. As a result, if the claim is adjudicated more than 12 months after the alleged disability's onset, the evidence may show that the impairment in fact al-

[4] The fact that a claimant is able to engage in substantial gainful activity at the time of the disability determination does not preclude the agency from concluding that the claimant was previously unable to engage in substantial gainful activity for 12 consecutive months, and that the claimant is therefore entitled to benefits. For example, if the claimant was "disabled" for the requisite period of time in the past, but has ceased to be disabled, the agency may award him benefits for what is called a "closed period" of disability. See, *e.g.*, Social Security Program Operations Manual, § 25510.001 (2001); 65 Fed. Reg. at 42,774.

ready has persisted with sufficient severity to prevent the claimant from being able to perform substantial gainful activity for the minimum 12-month period. Conversely, the evidence may prove that the impairment already has *not* persisted (and therefore cannot be "expected" to persist) at a disabling level of severity for 12 months. See *id.* at 42,774, 42,780.

Because the Act permits benefits to be awarded if the claimant is unable to engage in substantial gainful activity by reason of an impairment that "can be *expected* to last" 12 months, 42 U.S.C. 423(d)(1)(A) (emphasis added), disability claims can be—and often are—adjudicated "without having to wait 12 months from onset." 65 Fed. Reg. at 42,774.[5] In that situation, the statute "require[s] * * * a prediction that the worker's disability will continue for a total of at least 12 calendar months after onset of the disability" in order for benefits to be awarded. S. Rep. No. 404, *supra*, at 99. But if the alleged disability *already* "has existed for 12 calendar months or more" at the time the claim is adjudicated, "no [such] prognosis [is] required"; the Commissioner may rely on the claimant's actual experience during the 12-month period. *Ibid.*; see also 65 Fed. Reg. at 42,774.

b. *Trial work.* The Commissioner recently issued regulations addressing the nine-month trial work period under Title II. 20 C.F.R. 404.1592 (as added by 65 Fed. Reg. at 42,787). An individual is not entitled to a trial work period unless he is "entitled to disability insurance benefits." 42 U.S.C. 422(c)(3). Accordingly, the Commissioner has concluded that entitlement to a trial work period—like the entitlement to benefits—is contingent on the claimant's having suffered or being expected to suffer from an impairment of

[5] The average processing time for initial disability determinations by the Commissioner is about three and a half months. See Performance Plan for Fiscal Year 2002, at 77 <*http://www.ssa.gov/performance/2002/2002perfplan.pdf*>.

sufficient severity to prevent the performance of substantial gainful activity for at least 12 months. SSR 82-52, at 328 (Cum. ed. 1981-1985). Consequently, if the Commissioner has not already determined that the claimant is expected to be unable to work for at least 12 months by reason of the impairment, and if the individual in fact successfully returns to work within 12 months of the onset of the alleged disability and before the Commissioner makes such a determination, the claimant is not entitled to disability insurance benefits or, therefore, to a trial work period. See 20 C.F.R. 404.1592(d)(2) (as added by 65 Fed. Reg. at 42,787) ("You are not entitled to a trial work period" if "you perform work demonstrating the ability to engage in substantial gainful activity * * * before the date of any notice of determination or decision finding that you are disabled.").

B. Proceedings in this Case

1. In March 1995, respondent Cleveland Walton applied for disability insurance benefits under Title II and SSI benefits under Title XVI. Respondent had been terminated from his job as an in-school suspension teacher on October 31, 1994, and, following several unsuccessful attempts to return to work, had been diagnosed in March 1995 as having schizophrenia. In May of that year, less than seven months after his work as a teacher had ended and three months after applying for disability insurance benefits, respondent began working part-time as a cashier at a grocery store. His work hours gradually increased, and by October 1995, he earned more than $500 a month. Respondent began to work full time at the grocery store in December 1995, and he worked there successfully for two more years before being suspended for selling alcohol to a minor. Pet. App. 53a-54a; Admin. Rec. 440, 444.

In August 1996, the ALJ determined that respondent was disabled for the period between October 31, 1994, when he was discharged by the school district, and December 1995,

when he began to work full-time at the grocery store. Pet. App. 52a-61a. SSA's Appeals Council remanded the case to the ALJ to determine whether respondent had engaged in substantial gainful activity before December 1995 and within one year of the onset of his alleged disability. Under SSR 82-52, the Appeals Council noted, such activity, if it occurs before the lapse of the 12-month period following onset of the impairment and before the claimant has been found disabled, requires a denial of benefits. *Id.* at 47a-51a.

On remand, the ALJ denied respondent's claim for benefits. Pet. App. 39a-46a. Like the Appeals Council, the ALJ noted that the Commissioner's construction of the Act, set forth in SSR 82-52, provides that a claim must be denied when a claimant successfully returns to work (and thereby demonstrates the ability to perform substantial gainful activity) within 12 months of the alleged disability's onset. See Pet. App. 41a (The "duration requirement provides that [the claimant] must be prevented from performing substantial gainful activity [by reason of the impairment] for a 12-month period even if his impairment lasted or was expected to last for 12 months."). Reviewing the evidence and applying the regulatory criteria for determining whether work constitutes substantial gainful activity, the ALJ concluded that respondent in fact had "returned to substantial gainful activity in October 1995," because his earnings for that month were in excess of $500. *Id.* at 41a-44a.[6] The ALJ therefore

[6] Congress directed the Commissioner to "prescribe" by regulation "the criteria" for determining when "services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity." 42 U.S.C. 423(d)(4)(A) (1994 & Supp. V 1999). An applicant "whose services or earnings meet such criteria, shall * * * be found not to be disabled." *Ibid.* Pursuant to that authority, the Commissioner issued regulations providing that work was rebuttably presumed to be substantial gainful activity if the claimant earned more than $500 in a month. 20 C.F.R. 404.1574(b)(2)(2000). The Commissioner, after this case was decided, increased that amount to $700. 20 C.F.R. 404.1574(b)(2)(2001).

concluded that respondent could "not be found to be under a 'disability'" because his impairment had not "prevented [him] from working for any continuous period of 12 months." *Id.* at 44a.

The ALJ also determined that respondent was not entitled to a trial work period under Title II. Because respondent "is not under a 'disability,'" the ALJ reasoned, "he is not entitled to * * * a trial work period under the Regulations." Pet. App. 44a. The Appeals Council upheld the ALJ's decision. *Id.* at 36a-38a.

2. Respondent sought judicial review in the District Court for the Eastern District of Virginia. The magistrate judge recommended that summary judgment be granted in favor of the Commissioner, Pet. App. 30a-35a, and the district court accepted that recommendation, *id.* at 15a-26a. The magistrate and district court concluded that a claimant's disability—his inability to engage in substantial gainful activity by reason of an impairment—and not just his impairment must last at least 12 months. In this case, they observed, respondent had engaged in substantial gainful activity within 12 months of the date of onset of his impairment. Accordingly, the magistrate and district court held that respondent's claim failed at the first step of the five-step sequential evaluation process used for the adjudication of disability claims, see *Yuckert*, 482 U.S. at 140; 20 C.F.R. 404.1520(b), 416.920(b), because respondent had not been prevented from engaging in substantial gainful activity for the requisite 12-month period. See Pet. App. 23a-24a, 33a-34a.

The magistrate and district court also rejected respondent's request for a trial work period. They concluded that, because respondent was not entitled to disability benefits, he was not entitled to a trial work period either. See Pet. App. 17a-18a n.2.

Finally, the magistrate and district court rejected respondent's claim that "the ALJ erred in not finding him disabled

based on the fact that his impairment was 'expected' to last for a continuous period of not less than 12 months." Pet. App. 34a; see *id.* at 24a. They concluded that the ALJ "did not have to consider prospectively the expectations of the duration of his impairment because the ALJ had the benefit of knowing the actual amounts [respondent] did earn during the period." *Id.* at 34a; see *id.* at 24a. Those earnings "were consistently in excess of $500 per month beginning in October, 1995," and as high as $1,140 in December of that year. *Id.* at 34a; see *id.* at 24a-25a.

3. The court of appeals reversed. Pet. App. 1a-14a. It agreed with the ALJ and the district court that respondent had engaged in substantial work activity in October 1995, less than 12 months after the alleged disability's onset. *Id.* at 2a-3a n.1, 5a. But it rejected the Commissioner's and the district court's conclusion that respondent was ineligible for benefits as a result. *Id.* at 6a.

a. The court of appeals first examined the Commissioner's interpretation of the Act, which requires that the claimant's impairment have lasted, or be expected to last, for at least 12 continuous months at a level of severity sufficient to preclude substantial gainful activity. Applying the two-step test of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court rejected the Commissioner's approach at *Chevron* step one because, in the court's view, it was contrary to the "clear and unambiguous" language of the statute. Pet. App. 6a. The court reasoned that the phrase "which has lasted or can be expected to last for a continuous period of not less than 12 months" in 42 U.S.C. 423(d)(1)(A) modifies "impairment," not "inability to engage in SGA." *Id.* at 7a-8a; see *id.* at 11a. It follows, the court believed, that "a claimant whose impairment was 'expected to result in death,' or which 'lasted' or 'was expected to last' for a continuous period of not less than twelve months may be disabled, even if the inability to engage in substantial gainful activity does not cause death or actually

persist for twelve months." *Id.* at 8a. As the court read the Act, no "duration requirement for the inability to engage in substantial gainful activity * * * exists." *Id.* at 7a.

Based on that construction of the Act, the court of appeals concluded that respondent was entitled to disability insurance benefits because his underlying impairments—his schizophrenia and depression—were expected to last and did last in some discernible form for more than 12 months, even though they did not remain so severe as to prevent him from engaging in substantial gainful activity for 12 months. Pet. App. 9a. The court pointed out that respondent did not engage in a successful work attempt until "May 1995, two months after the five-month waiting period" in 42 U.S.C. 423(a) and (c)(2) had lapsed, and respondent did not engage in substantial gainful activity "until October 1995, well after the five-month waiting period had lapsed." Pet. App. 9a. Under those circumstances, the court concluded, respondent had met the statutory requirements for entitlement to an award of Title II disability insurance benefits. *Ibid.* The court did not separately address respondent's claim for SSI benefits under Title XVI of the Social Security Act, which has no waiting period.

b. The court of appeals next held that respondent was entitled to a trial work period under 42 U.S.C. 422(c). Pet. App. 9a-10a. In the court's view, respondent's entitlement to a trial work period was "conclusively settled" by the court's earlier conclusion that respondent was entitled to disability benefits as of April 1995, when the five-month waiting period under Title II expired. *Id.* at 9a. The court noted that the period of trial work begins once the claimant becomes entitled to disability benefits. *Ibid.* (citing 42 U.S.C. 422(c)(3), which provides that the "period of trial work" begins "with the month in which [the claimant] becomes entitled to disability insurance benefits."). Having found that respondent was entitled to benefits beginning in April 1995, the court found that respondent qualified for a nine-month trial work

period as of that date as well. *Ibid.* Because of that trial work period, the court held that respondent's work in October 1995, which was at a level that constituted substantial gainful activity, could not be used to support a determination that he was not disabled. *Ibid.*

c. Finally, the court rejected the Commissioner's construction of the Act as unreasonable under the second step of *Chevron*. Pet. App. 10a-13a. In so doing, the court for the most part repeated its textual analysis of the Act. *Id.* at 10a-11a. In addition, the court rejected as unreasonable the Commissioner's position that the trial work period cannot begin until after either (a) benefits are granted on the expectation that the individual will not be able to work for 12 months, or (b) the individual in fact was unable to work for 12 consecutive months. The court acknowledged that the Commissioner had interpreted the phrase "can be expected to last" in the definition of disability as intended to enable the Commissioner to "'adjudicate disability claims without having to wait 12 months from the alleged onset of disability, rather than to permit claims to be allowed in the face of evidence that the claimant's impairment did not prevent substantial gainful activity for 12 continuous months.'" *Id.* at 12a (quoting 60 Fed Reg. at 12,168). The court rejected that interpretation because the Act does not explicitly mention adjudication as a prerequisite to a finding of disability; because no other provision of the Act "differentiates between claims adjudicated within twelve months, and claims adjudicated after twelve months"; and because "under the Commissioner's interpretation, a finding of disability, or entitlement to benefits or a trial work period, would be determined, in part, by when the Commissioner adjudicated a claim." *Id.* at 13a.

SUMMARY OF ARGUMENT

I. A. Congress created Title II's disability insurance program in 1956 to fill a perceived gap in the social security

retirement system, which previously limited retirement benefits to workers who retired at age 65 or older. In particular, Congress sought to extend benefits to "workers who are forced into premature retirement" before age 65 by "reason of a permanent and total disability." H.R. Rep. No. 1189, 84th Cong., 1st Sess. 3 (1955). Congress initially ensured that benefits would be limited to such workers by requiring that the impairment that prevents substantial gainful activity be of long-continued and indefinite duration. Although Congress changed the duration requirement to "not less than 12 months" in 1965, it did so because experience had shown that, "in the great majority of cases in which total disability continues for at least a year the disability is essentially permanent." S. Rep. No. 404, 89th Cong., 1st Sess., Pt. I, at 99 (1965). The Act thus defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A); 42 U.S.C. 1382c(a)(3)(A) (1994 & Supp. V 1999). An individual, the Act also declares, "shall be determined to be under a disability *only if* his physical or mental impairment or impairments are of such severity that he" can neither "do his previous work" nor "engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A) (emphasis added); 42 U.S.C. 1382c(a)(3)(B) (emphasis added).

The Commissioner of Social Security has, for the more than four decades of the disability program's existence, consistently interpreted Section 423(d) as requiring *both* that the claimant's physical or mental impairment have lasted or be expected to last at least 12 months, *and* that the impairment have lasted or be expected to last that long at a *level of severity* sufficient to prevent substantial gainful activity. In this case, the court of appeals rejected that construction and

held that no "duration requirement for the inability to engage in substantial gainful activity * * * exists." Pet. App. 7a. The Act's text, the court held, requires only that the *impairment* last 12 months, and therefore precludes any requirement that the *disability* (*i.e.*, the inability to engage in substantial gainful activity on account of that impairment) last that long as well. *Id.* at 8a. The court of appeals' decision rests on faulty logic and a misunderstanding of the judicial role in construing a statute entrusted to an executive agency for administration.

The court of appeals reasoned that, because 42 U.S.C. 423(d)(1)(A) requires the *impairment* to have lasted or be expected to last 12 months, it cannot be construed as requiring the impairment to persist at a *disabling level of severity* during that period. But the court of appeals ignored the fact that Section 423(d)(1)(A) requires not merely an impairment, but also an inability to engage in substantial gainful activity "by reason of" that impairment; the impairment and the resulting inability to work are thus inextricably linked. More fundamentally, the fact that Section 423(d)(1)(A) requires the impairment to last for a particular amount of time simply does not resolve whether the impairment must persist at a specified level of severity during that time. Instead, it shows that Congress has not directly resolved the issue of severity during the 12-month duration through Section 423(d)(1)(A) itself, and instead has left that question for the agency to resolve through the exercise of its expertise. Finally, the court of appeals' analysis ignores the text of 42 U.S.C. 423(d)(2)(A), which requires that the impairment be so severe that it precludes all substantial gainful activity. The court nowhere explained why that severity requirement does not apply to the impairment for the entire 12-month duration requirement. Indeed, the court of appeals' construction is difficult to reconcile with the Act's structure and evident purpose of providing disability benefits to those who cannot work, not impairment compensation to individuals who can work.

B. As Congress has revised the Act over the years, it has repeatedly concurred in the Commissioner's construction. When Congress enacted the program in 1956, the House and Senate Reports explained that the Act provided benefits if the *disability*—statutorily defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment," 42 U.S.C. 423(d)(1)(A)—has lasted or can be expected to last the specified duration. After the Commissioner so construed the statute beginning with the 1957 regulations, Congress repeatedly amended the statute in closely related respects. Each time it not only carefully preserved, but also specifically reaffirmed and ratified, the Commissioner's construction. The Commissioner's construction thus is not merely reasonable or permissible; it is the construction that Congress intended.

C. The court of appeals' decision cannot be reconciled with Congress's deliberate decision not to provide benefits in cases of short-term, temporary disability. Under the court of appeals' construction of the Act, no "duration requirement for the inability to engage in substantial gainful activity * * * exists." Pet. App. 7a. It thus requires the Commissioner to process claims for and award Title II insurance benefits to individuals whose impairments prevent substantial gainful activity for as little as five months, and to process claims for and pay Title XVI SSI disability benefits to claimants who suffer an inability to engage in substantial gainful activity of virtually any duration, however brief. That result is inconsistent with Congress's intent, and its specific decision to reject a reduced disability duration period of six months that, in Congress's view, would have awarded benefits in cases of short-term, temporary disabilities.

II. A. The court of appeals also misconstrued 42 U.S.C. 422(c), which governs trial work periods. Under Section 422,

the trial work period begins with the month in which the claimant "becomes entitled to disability insurance benefits." 42 U.S.C. 422(c)(3). In this case, respondent never became entitled to benefits because, by the time his claim was adjudicated, respondent had returned to substantial gainful activity within 12 months of his disability's onset; in other words, his disability did not last (and therefore could not be expected to last) the required 12-month period. Because respondent never became "entitled" to benefits, the trial work period never began to run.

B. The Commissioner's trial work regulations are, in any event, entirely consistent with and reasonably implement the text of the Social Security Act. They precisely reflect, moreover, how Congress expected disability determinations would be made.

The court of appeals erred in invalidating the Commissioner's trial work regulations based on its concern that entitlement to benefits (and thus to a trial work period) might, under them, occasionally depend on when the claim is adjudicated. Although some claims may be affected by when they are determined, that is a necessary (if regrettable) consequence of permitting the agency "to adjudicate disability claims and award benefits without having to wait 12 months from onset" and the necessity, when so doing, of relying on potentially faulty predictions about the disability's duration. 65 Fed. Reg. at 42,780. Besides, decisions in other legal contexts, particularly ones requiring predictive judgments, are likewise influenced by when the adjudication takes place. Juries, for example, may consider an individual's post-claim, pre-trial behavior—such as successful rehabilitation—when assessing the extent or duration of a claimed injury, even though that evidence might have been unavailable if trial had occurred earlier. Yet no one suggests that courts must fashion an exclusionary rule for such evidence to avoid that result. Similarly, nothing compels the Commissioner to ignore evidence showing the precise duration of a claimant's

disabling impairment simply because it would have been unavailable if the claim had been adjudicated earlier.

ARGUMENT

I. THE SOCIAL SECURITY ACT DOES NOT PROVIDE DISABILITY BENEFITS TO A CLAIMANT WHOSE IMPAIRMENT HAS NOT LASTED AND CANNOT BE EXPECTED TO LAST 12 MONTHS AT A DISABLING LEVEL OF SEVERITY

As enacted in 1935, the Social Security Act provided retirement benefits to covered workers who retired at age 65, but did not provide benefits to workers who were "demonstrably retired" before that age "by reason of a permanent and total disability." See H.R. Rep. No. 1189, 84th Cong., 1st Sess. 3 (1955). To close that "gap" in the Act's coverage, *ibid.*, Congress in 1956 established a program of disability insurance under Title II of the Act. Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815. The Act now defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A). The Act further provides that an individual "shall be determined to be under a disability *only if* his physical or mental impairment or impairments are of such severity" that he can neither "do his previous work" nor "engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A) (emphasis added). Congress used those same definitions in 1972 when it established the Title XVI Supplemental Security Income program, which provides payments to disabled individuals who are financially needy. See 42 U.S.C. 1382c(a)(3)(A) (1994 & Supp. V 1999); 42 U.S.C. 1382c(a)(3)(B).

The Commissioner of Social Security has always interpreted and administered the Act to require both that the claimant's physical or mental impairment have lasted or be expected to last at least 12 months, *and* that the impairment have lasted or be expected to last that long at a *level of severity* sufficient to prevent substantial gainful activity. See pp. 24-27, *infra*. As the Commissioner recently explained following a notice-and-comment rulemaking, the "duration requirement to establish disability will not be met and a disability claim will be denied" if, "within 12 months after the onset of an impairment which prevented substantial gainful activity and before [the agency] ha[s] issued any notice of determination or decision finding disability, the impairment no longer prevents substantial gainful activity." Determining Disability and Blindness; Substantial Gainful Activity Guides, 65 Fed. Reg. 42,772, 42,774 (2000).

In revisiting and revising the disability provisions of the Social Security Act over the years, Congress too has consistently acted on the understanding that the *disability*—the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment," 42 U.S.C. 423(d)(1)(A)—must have lasted or be expected to last at least 12-months. See, *e.g.*, S. Rep. No. 404, 89th Cong., 1st Sess., Pt. I, at 98-99 (1965) (Act "provide[s] for the payment of disability benefits for an insured worker who has been or can be expected to be *totally disabled throughout a continuous period of 12 calendar months*" (emphasis added)); H.R. Rep. No. 231, 92d Cong., 1st Sess. 56 (1971) ("No benefit is payable * * * unless the *disability* is expected to last (or has lasted) at least 12 consecutive months." (emphasis added)). Indeed, when Congress amended the definition of disability in 1965 to replace the "long-continued and indefinite duration" requirement with a 12-month duration requirement, it chose 12 months because, "in the great majority of cases in which *total disability* continues for at least a year the *disability* is essentially permanent." S. Rep. No. 404, *supra*, at 99 (emphasis added). And when Congress amended the definition of disability again in 1967 by adding the limitations in Section 423(d)(2)(A), which expressly condition a finding of disability on the claimant's inability to perform substantial gainful activity, it "reaffirm[ed] that" a claimant "who does substantial gainful work despite an impairment or impairments * * * is not disabled for purposes of establishing a period of disability or for social security benefits based on disability during any period in which such work is performed." S. Rep. No. 744, 90th Cong., 1st Sess. 49 (1967).

The court of appeals in this case nevertheless held that no "duration requirement for the inability to engage in substantial gainful activity * * * exists." Pet. App. 7a. Rejecting repeated expressions of congressional intent and the Commissioner's longstanding construction of the Act, the court of appeals read the text of 42 U.S.C. 423(d)(1)(A) to require only that the claimant's *impairment* last at least 12 months, and, in addition, to preclude the Commissioner from construing the Act to require that the claimant's *disability*—*i.e.*, his "inability to engage in any substantial gainful activity by reason of" that impairment—last at least 12 months as well. *Id.* at 8a. The court of appeals' construction of the statute, however, ignores the express statutory link ("by reason of") between the underlying impairment and the resulting inability to engage in substantial gainful activity. It also rests on faulty logic—that because the Act requires the *impairment* to last 12 months, it cannot also be construed to require the impairment to persist at a *disabling level of severity* for that 12-month period. The court's analysis, moreover, erroneously ignores the additional limitation on the definition of disability in Section 423(d)(2)(A), contravenes Congress's repeatedly expressed intent, and is at war with the Act's purpose of establishing a program for individuals who have *long-term* disabilities. Indeed, Congress has consistently rejected proposals that would extend Titles II

and XVI's coverage from long-term disabilities to short-term disabilities. Yet, the court of appeals' construction effects precisely such an extension, requiring the award of SSI benefits, for example, if an impairment causes an inability to work of virtually any duration.

A. The Commissioner Has Reasonably Construed The Act To Require That A Claimant's Inability To Engage In Substantial Gainful Activity Last For 12 Months

Where an Act of Congress speaks clearly "to the precise question at issue," the court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 843 (1984). If "the statute is silent or ambiguous with respect to the specific issue," however, the court must sustain an agency's interpretation if it is "based on a permissible construction of the statute." *Id.* at 843; see also *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 457 (1998) ("If the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight"). That deference is particularly appropriate where, as here, Congress has accorded the Commissioner power to issue legislative rules, 42 U.S.C. 405(a) (rulemaking authority); see *Sullivan* v. *Zebley*, 493 U.S. 521, 528 (1990); *Yuckert*, 482 U.S. at 145; *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983), made applicable to Title XVI by 42 U.S.C. 1383(d)(1); and to issue written guidelines for state agencies to follow in adjudicating claims, 42 U.S.C. 421(a)(2) (requiring States to make disability determinations "in accordance with * * * the standards and criteria contained in regulations or other written guidelines of the Commissioner of Social Security"), made applicable to Title XVI by 42 U.S.C. 1383b(a). In such circumstances, the standards adopted by the Commissioner have "legislative effect" and are entitled "to more than mere deference or weight." *Batterton* v. *Francis*, 432 U.S. 416, 425, 426 (1977) (addressing statute requiring States to comply "with standards prescribed by the Secretary"). Rather, the Commissioner's construction must be "given controlling weight" unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Zebley*, 493 U.S. at 528 (quoting *Chevron*, 467 U.S. at 843-844). Moreover, as this Court has recognized, the "Social Security Act is among the most intricate ever drafted by Congress. * * * Perhaps appreciating the complexity of what it had wrought, Congress conferred on the [Commissioner] exceptionally broad authority to prescribe standards for applying certain sections of the Act." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43 (1981). Under these principles, the Commissioner's interpretation of the Act should be sustained.

1. The text of the Social Security Act does not directly resolve the precise question before the Court. The Act defines disability in part as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A). By its terms, Section 423(d)(1)(A) requires that the *impairment* have lasted or be expected to last 12 months (or result in death). But Section 423(d)(1)(A) does not speak directly to whether the impairment must persist during those 12 months at any particular level of severity—in particular, whether it must be sufficiently severe to prevent substantial gainful activity. Nor does it specify how long the *disability*—the inability to work "by reason of" the impairment—must last. On those issues, Section 423(d)(1)(A) is ambiguous.

In 1967, Congress added Section 423(d)(2)(A) to supplement and clarify the basic definition of "disability." Section 423(d)(2)(A) provides that, "[f]or purposes of paragraph [d](1)(A)"—the basic definition of disability—a claimant "shall be determined to be under a disability *only if* his physical or mental impairment or impairments are of such

severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A) (emphasis added). By amending the Act to add Section 423(d)(2)(A), Congress made it clear that, for purposes of disability determinations, it is not sufficient that there merely be some sort of discernible impairment. Instead, there must be an impairment that is sufficiently severe to preclude any substantial gainful activity.

2. The Commissioner has consistently construed Section 423(d) to mean that a claimant is not entitled to disability benefits unless, during the 12 months for which the impairment has persisted or can be expected to persist, the impairment is so severe that it precludes substantial gainful activity. After the 1956 amendments, in which Congress first afforded benefits for insured workers who were disabled by impairments of "long-continued and indefinite duration," the Commissioner immediately interpreted the Act as requiring the impairment to persist at a disabling level of severity for the specified duration ("long-continued and indefinite"). The Commissioner's regulations, issued in 1957, see 22 Fed. Reg. 4362, 4363, provided that an impairment is of long-continued and indefinite duration under the Act only if "it cannot reasonably be anticipated that the impairment will, in the foreseeable future, be *so diminished as no longer to prevent substantial gainful activity.*" 20 C.F.R. 404.1502(f) (1960 Supp.) (emphasis added); 20 C.F.R. 404.1502(f) (1961) (same); see also 20 C.F.R. 404.1520(g) (1961) ("An individual will be deemed not under a disability if, with reasonable effort and safety to himself, the impairment can be diminished to the extent that the individual will not be prevented by the impairment from engaging in any substantial gainful activity."). The Commissioner's written instructions to the States, which must make disability determinations "in accordance with * * * the standards and criteria contained

in" the Commissioner's "written guidelines," 42 U.S.C. 421(a)(1) and (2), also made that clear. See OASI Disability Insurance Letter No. 39 (Pt. V of Disability Insurance State Manual), at 1 (Jan. 22, 1957) ("long-continued and indefinite duration" requirement refers to the "expected duration of the medical impairment" at a "level of severity sufficient to preclude SGA").

After Congress changed the duration requirement from "long-continued and indefinite" to "not less than 12 months" in 1965, the Commissioner continued to require that the impairment persist at a disabling level of severity for the specified period. The impairment, the Commissioner explained, must be "expected to last *at a disabling level* for 12 months or more from onset." SSA Disability Insurance Letter No. III-6 (Pt. III of Disability Insurance State Manual), at 4 (Nov. 19, 1965) (emphasis added); Disability Insurance State Manual, § 316 (Sept. 9, 1965) ("Duration of impairment refers to that period of time during which an individual is *continuously unable to engage in substantial gainful activity* because of a medically determinable physical or mental impairment.") (emphasis added).[7]

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[7] See also Disability State Insurance Manual, § 316.1-A (Sept. 9, 1965) ("Where the claimant is engaging in SGA, or is held to be able to engage in SGA * * *, a finding of disability may be made if the impairment prevented the claimant from engaging in SGA for at least 12 consecutive months."); *id.* at § 316.1-C (where adjudication occurs "before the impairment has lasted 12 months," the decisionmaker must examine the evidence to determine "whether the impairment will continue to prevent the individual from engaging in SGA for the additional number of months needed to make up the required 12 months duration"); SSA, Concepts of Disability and Principles of Evaluation, at 3 (Jan. 1966) (Because "the disabling impairment must have lasted or be expected to last 12 continuous months from onset," an "impairment which became incapacitating on April 12 must have continued or be expected to continue at a disabling level into April 11 of the following year."); SSA Disability Insurance Letter No. II-24 (Pt. II of Disability Insurance State Manual), at 4 (Aug. 30, 1965) ("In all cases, use existing guides for determining whether the claimant is able to engage in any SGA since the 1965 Amendments made

The Commissioner has never wavered from that construction. See, *e.g.*, Social Security Ruling (SSR) 73-7c, at 122-123 (Cum. ed. 1971-1975) (adopting construction, set forth in *Alexander* v. *Richardson*, 451 F.2d 1185, 1186 (10th Cir. 1971), cert. denied, 407 U.S. 911 (1972), under which both "components of disability"—the impairment and the resulting inability to work—"must exist at the same time to satisfy the twelve month duration requirement"); SSR 82-52, at 328 (Cum. ed. 1981-1985) ("In considering 'duration,' it is the inability to engage in SGA because of the impairment that must last the required 12-month period."); 20 C.F.R. 404.1520(b) (2000) (when the claimant is "working and the work [he is] doing is substantial gainful activity," the agency "will find that [the claimant is] not disabled regardless of [his] medical condition or [his] age, education, and work experience."); 20 C.F.R. 404.1520(f) (2000) ("Your impairment(s) must prevent you from doing any other work."); 20 C.F.R. 404.1571 (2000) ("If you are able to engage in substantial gainful activity, we will find that you are not disabled."). Thus, as the Commissioner explained in promulgating the most recent regulations, it has been the agency's "longstanding" position that "the duration requirement to establish disability will not be met" if the "impairment no

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no change with respect to the issue of severity. * * * [U]nder the 1965 Amendments the impairment, which prevents SGA, must have lasted or be expected to last 12 months from onset of disability. * * * An individual with a disabling impairment * * * would be found under a disability if he is undergoing therapy * * * and his disability, nonetheless, has lasted or is expected to last 12 months from onset. If it is found that the claimant is able to engage in SGA in accordance with existing criteria, a finding of 'no disability' should be made. If it is found that, although the claimant is currently unable to engage in SGA, in accordance with existing criteria, he is expected to be able to engage in SGA within 12 months from onset, a finding of 'no disability' should be made."); SSA Disability Insurance Letter No. III-6, *supra*, at 1, 4. 6 (1965 amendments "made no change in the severity requirement"; thus impairments must be "expected to last at a disabling level for 12 months or more from onset.").

longer prevents substantial gainful activity" before the 12-month period has lapsed. 65 Fed. Reg. at 42,774.[8]

3. The Commissioner's construction is fully supported by the Act's text and structure. Section 423(d)(1)(A) requires not only that there be an underlying "impairment" lasting the specified duration, but also an inability to engage in substantial gainful activity "by reason of" that impairment. 42 U.S.C. 423(d)(1)(A). The impairment and the resulting inability to work thus are inextricably linked. Furthermore, Section 423(d)(2)(A) expressly provides that a claimant may be found disabled "only if" his impairment is of "such severity" as to render him unable to perform any substantial gainful work that exists in the national economy. It therefore is entirely reasonable for the Commissioner to construe the Act to require that the impairment that must last at least 12 months under Section 423(d)(1)(A) be one that is of "such severity" as to satisfy Section 423(d)(2)(A) during those 12 months.

Indeed, prior to the Fourth Circuit's decision in this case, the courts of appeals had repeatedly upheld the Commissioner's interpretation of Section 423(d) to require that both the underlying impairment and the resulting inability to engage in substantial gainful activity must have lasted or be expected to last for the statutory 12-month period. For example, in *Alexander*, 451 F.2d at 1186, the Tenth Circuit rejected the reasoning that was adopted by the Fourth Circuit in this case, and affirmed the Commissioner's decision denying benefits because the "disability extended for a period of less than twelve months, although there was an impairment

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[8] A claimant's *unsuccessful* attempt to return to work before the expiration of the 12-month disability period will not prevent the claimant from being entitled to disability benefits. The Commissioner "will disregard work attempts lasting 6 months or less that do not demonstrate the ability to perform sustained substantial gainful activity even if the unsuccessful work attempt occurs prior to adjudication of the claim for benefits." 65 Fed. Reg. at 42,780. See 20 C.F.R. 404.1574(c), 404.1575(d) (2001).

which lasted for more than one year." *Id.* at 1186. The court explained:

> To recover disability benefits under the Act an applicant must be unable to engage in any substantial gainful activity. Disability is established by showing a medically determinable mental or physical impairment which prevents [the claimant from] engaging in any gainful activity. Inability to engage in any gainful activity and the impairment which causes it cannot be separated. The two components of disability must exist at the same time to satisfy the twelve month duration requirement.

Ibid. Other courts of appeals have agreed. See *Titus* v. *Sullivan*, 4 F.3d 590, 594 (8th Cir. 1993) ("We agree with the district court that the interpretation of 'duration of impairment' was settled in *Alexander* v. *Richardson*, 451 F.2d 1185 (10th Cir. 1971)."). See also *McDonald* v. *Bowen*, 818 F.2d 559, 564 (7th Cir. 1986) (the "disability" must be "expected to last at least twelve continuous months from its alleged onset date; otherwise she will not receive benefits"); *Estep* v. *Richardson*, 459 F.2d 1015, 1016 (4th Cir. 1972) ("To obtain disability benefits under the Act a claimant must have an impairment which prevents him from engaging in substantial gainful activity for a period of at least 12 months.").

4. The Commissioner's construction of the Act is not only consistent with the Act's text but is also firmly grounded in common sense. Workers often may have impairments that last longer than a year, but that prevent them from being able to work only for a much shorter time. See, *e.g.*, *Alexander*, 451 F.2d at 1186 ("For example, an applicant may have an injury from which he has lost one of his hands. The result is a physical impairment for the remainder of his life, but if he is able to engage in any gainful activities within a year from his injury he is not entitled to benefits."). In fact, many relatively common ailments—from back injuries, to high blood pressure, to carpal tunnel syndrome—may predictably last a

lifetime, but may preclude the individual from working only briefly or for relatively brief, intermittent periods. Titles II and XVI of the Act, however, were designed to provide *disability* benefits to persons who cannot engage in substantial gainful activity, not to provide *impairment* benefits to those who can.

Congress originally enacted the disability insurance program to fill a "gap" in Social Security's retirement system by providing benefits to those "forced into premature *retirement*" before age 65 "by reason of a *permanent and total* disability." H.R. Rep. No. 1189, *supra*, at 3 (emphasis added). See pp. 2, 19, *supra*; see also pp. 39-40, *infra* (discussing Congress's rejection of benefits for short-term disabilities). It is thus the sustained inability to work on account of an impairment, not the impairment alone without regard to its effect on the claimant, that gives rise to the need and justification for the payment of disability benefits.

5. The court of appeals nevertheless rejected the Commissioner's construction, holding that the definition of "disability" in Section 423(d)(1)(A) *precludes* the Commissioner from construing the Act to require that the inability to engage in substantial gainful activity have lasted, or be expected to last, at least 12 months. The court of appeals, however, did not identify any provision of the Act that expressly states that there is no "duration requirement for the inability to engage in substantial gainful activity." Pet. App. 7a. It did not identify any provision stating that the impairment need not persist at a disabling level of severity for the statutory 12-month period. And it offered no plausible reason why Congress would have insisted that the underlying impairment last for 12 months but not the claimant's inability to work "by reason of" that impairment. Instead, the court relied on the observation that, as a matter of grammar, the phrase "which has lasted or can be expected to last for not less than 12 months" in Section 423(d)(1)(A) modifies the word "impairment," and not the phrase "inability to engage

in any substantial gainful activity." *Id.* at 7a-8a. Accordingly, the court declared, there is no duration requirement for the disability, *id.* at 7a, and a claimant is disabled if he has an impairment that has lasted or is expected to last 12 months, "even if the inability to engage in substantial gainful activity" on account of the impairment "does not * * * actually persist for twelve months." *Id.* at 8a.

As a matter of grammar, the court of appeals is correct that the phrase "which has lasted or can be expected to last" in Section 423(d)(1)(A) modifies the word "impairment." Section 423(d)(1)(A) therefore does expressly require that the *impairment* last at least 12 months. But the court of appeals erred in leaping from that unremarkable observation to the remarkable conclusion that Section 423(d)(1)(A) affirmatively *precludes* a construction under which the disability —the inability to engage in substantial gainful activity "by reason of" the impairment—must also have lasted or be expected to last 12 months. In fact, the court of appeals' grammatical parsing of Section 423(d)(1)(A) shows no more than that, while that provision clearly addresses how long the impairment must last, it is ambiguous regarding how *severe* the impairment must be during that 12-month period. In other words, it does not specifically address whether the impairment must persist with such severity as to preclude all substantial gainful activity during the qualifying period—much less foreclose the Commissioner from construing the Act to embody such a requirement. Cf. *Mourning* v. *Family Publ'n Serv., Inc.*, 411 U.S. 356, 372-373 (1973). Because the text of Section 423(d)(1)(A) does not unambiguously resolve this issue, it is for the Commissioner, not the court of appeals, to choose among reasonable constructions. See *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 703-704 (1991).[9]

[9] The court of appeals' imposition of its own construction appears implicitly to rest on an application of the maxim *expressio unius est exclusio alterius*. In particular, the court assumed that Congress, by expressly requiring that the *impairment* last 12 months, implicitly precluded any construction of the Act that requires any resulting *disability* to last that long as well. The maxim, however, has no application here. First, Congress's provision of an express duration period for an impairment simply does not speak to, much less impliedly preclude, the Commissioner from addressing how *severe* the impairment must be during that duration. Indeed, the statute itself seems to anticipate that the impairment and the inability to engage in substantial gainful activity "by reason of" the impairment will be coterminous. See pp. 23-24, 27-28, *supra*.

Second, as other courts of appeals have recognized, application of the *expressio unius* canon is not appropriate in cases (such as this one) that involve an administrative agency's construction of a statute. *Texas Rural Legal Aid, Inc.* v. *Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) ("Whatever its usefulness in other circumstances * * * th[e] canon has little force in the administrative setting."); *Whetsel* v. *Network Property Servs., LLC*, 246 F.3d 897, 902 (7th Cir. 2001) ("[T]he canon of *expressio unius est exclusio alterius* has reduced force in the context of interpreting agency administered regulations and will not necessarily prevent the regulation from being considered ambiguous"). The reason is that an agency's interpretation must be given deference unless Congress has "directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842, and "the *expressio unius* maxim, unsupported by arguments based on the statute's structure or legislative history, 'is simply too thin a reed to support the conclusion that Congress has clearly resolved [an] issue.'" *Martini* v. *Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1343 (D.C. Cir. 1999) (quoting *Texas Rural Legal Aid*, 940 F.2d at 694), cert. dismissed, 528 U.S. 1147 (2000); see also *Cheney R.R.* v. *ICC*, 902 F.2d 66, 69 (D.C. Cir.), cert. denied, 498 U.S. 985 (1990); *Mobile Communications Corp.* v. *FCC*, 77 F.3d 1399, 1404-1405 (D.C. Cir.), cert. denied, 519 U.S. 823 (1996); *Amax Land Co.* v. *Quarterman*, 181 F.3d 1356, 1365 (D.C. Cir. 1999). This case proves that point. Here, the legislative history shows that Congress not only lacked an intent to preclude the Commissioner's interpretation and implementation, but actually contemplated them as based on the proper understanding of the Act. See pp. 20-21, *supra*; pp. 32-39, *infra*.

More fundamentally, the court of appeals' analysis wholly ignores Section 423(d)(2)(A), which gives additional content to the definition of "disability." Section 423(d)(2)(A) specifically declares that an individual is disabled "only if" the impairment precludes him from engaging in substantial gainful activity. See pp. 23-24, *supra*. The Commissioner has consistently concluded that the severity requirement codified in Section 423(d)(2)(A) applies throughout the 12-month period

during which the impairment must persist. That construction is directly supported by the text of Section 423(d)(1)(A), which requires not merely an impairment that has lasted or can be expected to last at least 12 months, but also an inability to engage in substantial gainful activity "by reason of" that 12-month long impairment. Congress, moreover, has endorsed the Commissioner's construction. When it amended the Act to add Section 423(d)(2)(A), it "reaffirm[ed]" that an individual "who does substantial gainful work despite an impairment" is "not disabled for purposes of establishing a period of disability or for social security benefits based on disability during any period in which such work is performed." S. Rep. No. 744, *supra*, at 49 (emphasis added). The court of appeals, by contrast, pointed to nothing in the Act that specifically precludes the Commissioner's construction.[10]

B. The Commissioner's Interpretation Is Supported By the History Of Congress's Amendments To The Act

Even if the text of the Act does not compel the conclusion that Congress intended to impose a duration requirement for the disability—*i.e.*, to require that the impairment be of disabling severity in each of the 12 months during which it has persisted or can be expected to persist—the history of the

[10] The court of appeals' decision also places a gloss on the Act that seems unlikely in view of its structure. Section 423(d)(1)(A) by its terms speaks of an inability to engage in substantial gainful activity by reason of an "impairment" that either "can be expected to result in death" *or* "has lasted or can be expected to last" for at least 12 months. The first alternative obviously implies an element of great severity; it is therefore sensible to read the second alternative, the requirement that the impairment have lasted or be expected to last for 12 months, as encompassing an element of substantial severity as well. By contrast, it is implausible to suppose that Congress commanded an award of benefits whenever a disabling impairment is so severe that it is expected to cause death, *and* whenever the impairment is only briefly disabling but persists for 12 months in a relatively inconsequential form. Yet that is precisely the construction adopted by the decision below.

Act and its implementation does. It is well established that the proper construction of an Act of Congress may be informed by pre-existing administrative constructions of which Congress was aware. Cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). Here, over a period that spans more than four decades, Congress repeatedly acknowledged the Commissioner's construction, repeatedly endorsed it when amending the Act, and repeatedly adopted that construction itself.

1. When Congress first established the disability insurance program in 1956, it provided disability benefits to covered workers who were unable to engage in substantial gainful activity on account of an impairment of a "long-continued and indefinite duration." See Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815; 42 U.S.C. 423(c)(2) (1958). Anticipating the Commissioner's construction, Congress understood that provision as requiring "that the disability," which was statutorily defined as the inability to work on account of the impairment, "be of long-continued and indefinite duration." H.R. Rep. No. 1189, *supra*, at 5. Thus, the House Report explained, "an individual who is able to engage in any substantial gainful activity will not be entitled to disability-insurance benefits." *Ibid.* Consistent with the House Report, the Commissioner's regulations under Section 405(a) and "written guidance" issued to the state agencies pursuant to 42 U.S.C. 421(a)(1) and (2) made it clear that the "long-continued and indefinite duration" requirement refers to the expected duration of the medical impairment at a level of severity sufficient to preclude substantial gainful activity. See pp. 24-25, *supra* (citing the Commissioner's 1957 and 1961 regulations, as well as the 1957 OASI Disability Insurance Letter No. 39).

That construction is consistent not merely with the text and legislative history of the 1956 amendments themselves, but also with the "disability freeze" provisions of the Social Security Amendments of 1954, ch. 1206, § 106, 68 Stat. 1079,

1080, from which the language of the 1956 amendments was drawn. The disability freeze provisions sought to ensure that individuals who had worked a sufficient amount of time to qualify for retirement benefits did not find their entitlements substantially reduced because of a sustained period of disability—*i.e.*, inability to engage in substantial gainful activity by reason of an impairment—prior to retirement. That could occur before 1954 because benefits were calculated as a percentage of the worker's average earnings. The 1954 disability freeze provisions excluded from consideration the periods during which the worker was unable to engage in substantial gainful activity because of a disability. The committee reports on the 1954 amendments reveal an expectation that the *inability to work* had to be long-lasting before the disability freeze provisions could be invoked. See H.R. Rep. No. 1698, 83d Cong., 2d Sess. 2-3 (1954) ("Long periods of absence from covered work generally indicate that the individual has not been dependent on his own earnings from work for support, and benefits are properly reduced or not paid in such circumstances," except in "the case of workers who are out of employment by reason of a total disability lasting for an extended period of time."); S. Rep. No. 1987, 83d Cong., 2d Sess. 20 (1954) (disability freeze redresses problem that, under present law, a worker's "old-age and survivors insurance rights are impaired or may be lost entirely when workers have periods of total disability before reaching retirement age.").[11]

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[11] The 1954 committee reports also state that the "long-continued and indefinite duration" requirement "refers only to the duration of the impairment and does not require a prediction of a continued inability to work." H.R. Rep. No. 1698, *supra*, at 23; S. Rep. No. 1987, *supra*, at 21. Those statements, however, are inconsistent with Congress's expectation that the period of disability would be lengthy, and were subsequently refuted by the reports accompanying the enactment of Section 423(d)(1)(A) in 1956 and subsequent amendments, see p. 33, *supra*; pp. 35-39, *infra*, which express the expectation that the disability must last as long as the impairment. Moreover, in 1954, when the disability freeze provisions were enacted, any distinction between the inability to engage in substantial gainful activity and the impairment giving rise to it might have been expected to be largely without significance insofar as duration was concerned. Before the 1954 amendments, benefits would be reduced or placed at risk when the worker's *earnings* declined. If the impairment did not preclude substantial gainful activity and the worker's earnings did not decline as a result, there would have been no need to invoke the disability freeze provisions. Moreover, under Section 102(b)(2) of the 1954 Amendments, the Secretary could exclude up to four years of a claimant's work history from the calculation of the claimant's "average monthly wage" if doing so "would produce the highest primary insurance amount." 68 Stat. 1063. That provision, Secretary of Health, Education, and Welfare Oveta Culp Hobby explained, protected workers who had "short periods of absence from covered work." *The Social Security Amendments of 1954: Hearings Before the House Comm. on Ways and Means*, 83d Cong., 2d Sess. 68 (1954). The disability freeze provisions were thus necessary only to protect the rights of workers who were forced to spend "long periods out of the labor force" due to "a totally disabling condition." *Ibid.*

2. When Congress amended Section 423(d) in the Social Security Amendments of 1965, Pub. L. No. 89-97, § 303(a)(1), 79 Stat. 366, it was well aware of the Commissioner's construction. The House Report on the bill noted that, "[u]nder present law," benefits are "payable only if the worker's *disability*"—*i.e.*, the inability to engage in substantial gainful activity by reason of the impairment—"is expected * * * to be of long-continued and indefinite duration." H.R. Rep. No. 213, 89th Cong., 1st Sess. 88 (1965) (emphasis added). Although Congress changed the duration requirement from "long-continued and indefinite" to "not less than 12 months," Congress declined to disturb the requirement that the impairment persist at a disabling level of severity for the specified period. Thus, the Senate Report explained that the 1965 amendments "eliminate the present requirement that a worker's disability must be expected to be of long-continued and indefinite duration, and instead provide that an insured worker would be eligible for disability benefits if he has been *under a disability* which * * * has lasted or can be expected to last for a continuous period of *not less than 12 cal-*

endar months." S. Rep. No. 404, *supra*, at 13 (emphasis added). The Senate Report further explained that the Act, as amended, "would provide for the payment of disability benefits for an insured worker who has been or can be expected to be *totally disabled* throughout a *continuous period of 12 calendar months.*" *Id.* at 98 (emphasis added); see also *id.* at 13 (an insured worker is "eligible for disability benefits if he has been *under a disability* which can be expected to last for a continuous period of not less than 12 calendar months" (emphasis added)).[12]

"It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). That principle is of particular force where, as here, the legislative history expressly acknowledges the agency's construction and manifests an intent to preserve it.[13]

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[12] See also S. Rep. No. 408, 96th Cong., 1st Sess. 13 (1979) (explaining that, in 1965, "the definition requiring that a disability be of 'long-continued and indefinite duration' was changed to permit benefits for *disabilities* expected to last at least 12 months." (emphasis added)).

[13] Congress was specifically advised of the Commissioner's construction and the effect it would have on the proposed legislation. Testifying before a congressional committee on the then-pending proposal to replace the "long-continued and indefinite duration" requirement with a 6-month duration requirement, Commissioner of Social Security Robert M. Ball explained that the bill would "drop[] the requirement that we make a prognosis that the *disability* will last for a long and indefinite period." *Hearings on H.R. 6675 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess., Pt. I, at 153-154 (1965) (emphasis added). The people "picked up by" changing the "long-continued and indefinite" duration requirement to a six-month duration requirement, he added, would be those "whose condition is such that there is no question about the fact that they *can't work* for [the proposed] 6 month period." *Ibid.* (emphasis added).

3. a. Congress has since repeatedly reaffirmed the Commissioner's construction. Shortly after the 1965 amendments, the Commissioner issued revised criteria specifying that the impairment must have prevented or be expected to prevent the performance of substantial gainful activity throughout the 12-month period. See pp. 25-26 & note 7, *supra*. When Congress amended the Act in 1967 to supplement the basic definition of "disability," it re-emphasized in the text of the amendment itself that the impairment must be of "such severity" so as to preclude the claimant from "engag[ing] in any * * * kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A). And far from suggesting that Congress was unaware or opposed to the Commissioner's application of that severity requirement when determining whether the disability has lasted or can be expected to last the requisite 12-month duration, Congress endorsed that approach: "[A]n individual who does substantial gainful work despite an impairment or impairments" that otherwise might be disabling, the Senate Report "reaffirm[ed]," is "not disabled for purposes of establishing a period of disability or for social security benefits based on disability during any period in which such work is performed." S. Rep. No. 744, *supra*, at 49; S. Rep. No. 544, 90th Cong., 1st Sess. 31 (1967) (same).

b. When Congress established the SSI program in Title XVI of the Act in 1972 to provide financial assistance to needy disabled persons, it incorporated the definition of "disability" from Title II into the SSI program. Specifically, acting against the settled background of the Commissioner's longstanding construction of Sections 423(d)(1)(A) and (d)(2)(A), Congress enacted those provisions virtually verbatim in Title XVI. See 42 U.S.C. 1382c(a)(3)(A) (1994 & Supp. V 1999); 42 U.S.C. 1382c(a)(3)(B). Just as "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," it likewise can be pre-

sumed to have done so when it "adopts a new law incorporating sections of [that] prior law." *Lorillard*, 434 U.S. at 580, 581. In incorporating the language of Section 423 into Title XVI, moreover, Congress expressly recognized that, under Section 423, "[n]o benefit is payable * * * unless the *disability* is expected to last (or has lasted) at least 12 consecutive months." H.R. Rep. No. 231, *supra*, at 56 (emphasis added). And it made clear that that rule "would not be changed" by the 1972 amendments. *Ibid.*; see also p. 42, *infra* (explaining further changes made by the 1972 amendments).

c. Congress reaffirmed the Commissioner's construction again in 1984. Following the 1972 amendments, the Commissioner reiterated, through a series of Social Security Rulings, the requirement that the impairment prevent or be expected to prevent the performance of substantial gainful activity during the entire 12-month disability period. See, *e.g.*, SSR 73-7c and SSR 82-52 (cited and quoted p. 26, *supra*). The Commissioner also incorporated the severity requirement into the regulatory five-step sequential evaluation process. See *Yuckert*, 482 U.S. at 147-148. Under that five-step process, a claim that is adjudicated more than 12-months after onset of the alleged disability will be denied if the claimant has returned to substantial gainful activity within the 12-month period. See H.R. Rep. No. 618, 98th Cong., 2d Sess. 6-9 (1984); 20 C.F.R. 404.1520 (1982). After examining that process and clarifying the criteria that must be used in evaluating disabilities, see Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, Congress emphasized that it did not "intend to alter the current definition" of disability. H.R. Rep. No. 618, *supra*, at 6. To the contrary, Congress "reaffirm[ed] that the purpose of the disability insurance program is to provide benefits only for those who are unable to work." *Id.* at 7; see also *id.* at 8 ("emphasiz[ing] * * * the intent of Congress that disability benefits should be granted to those who are

unable to work because of a medically determinable impairment").

4. The more than four-decade history of the definition of disability thus makes one thing unmistakable: Congress specifically contemplated the Commissioner's construction of the Act, endorsed it, and reaffirmed it. In view of that history, the Commissioner's construction is not merely a "reasonable" or "permissible" interpretation of the Act. *Chevron*, 467 U.S. at 842-843, 844; *Sullivan* v. *Everhart*, 494 U.S. 83, 89 (1990) ("rational and consistent with the statute"). It is the *most* reasonable interpretation, and the one that Congress intended.

C. The Court Of Appeals' Construction Creates Precisely The Short-Term Disability Program That Congress Chose Not To Enact

1. Congress created Title II's disability insurance program in 1956 to fill a perceived "gap" in the Social Security retirement system by providing benefits to "workers who are forced into premature retirement" before age 65 by "reason of a permanent and total disability." H.R. Rep. No. 1189, *supra*, at 3 (emphasis added). Congress initially ensured that the program achieved that limited goal by requiring that the disabling impairment be of long-continued and indefinite duration. When Congress in 1965 changed the duration requirement from long-continued and indefinite to not less than 12 months, Congress chose 12 months because it was a reasonable proxy for permanence. "[E]xperience under the disability program" between 1956 and 1965, Congress determined, had "demonstrated [that] in the great majority of cases in which total disability continues for at least a year the disability is essentially permanent." S. Rep. No. 404, *supra*, at 99. Congress, in fact, rejected a shorter six-month period, proposed in the House of Representatives, because it "could result in the payment of disability benefits in cases of short-term, temporary disability." *Id.* at 98-99. The Senate Report explained that, in order to prevent the

payment of benefits in cases of such temporary disabilities, it is "necessary to require that a worker be *under a disability* for a somewhat longer period than 6 months in order to qualify for disability benefits." *Ibid.* (emphasis added).

The court of appeals' decision cannot be reconciled with Congress's deliberate decision not to provide benefits "in cases of short-term, temporary disability." S. Rep. No. 404, *supra*, at 99. As the court of appeals acknowledged, under its construction of the statutory language, no "duration requirement for the inability to engage in substantial gainful activity * * * exists." Pet. App. 7a. As a result, the Commissioner would have to award Title II insurance benefits to any claimants who are unable to work for only five months (the duration of the waiting period provided by 42 U.S.C. 423(c)(2)(A)). Moreover, because Title XVI does not have a waiting period, the Commissioner would be required to pay Title XVI SSI disability benefits to claimants who suffer an inability to engage in substantial gainful activity of virtually *any* duration, which would create a standard of eligibility for benefits that is far more lenient even than the five-month standard that the court of appeals fashioned for Title II. The court of appeals nowhere explained why Congress would have intended such a result; nor did it explain why that result is consistent with Congress's repeated decision to cover only long-term disabilities.

2. Perhaps recognizing that defect in the decision below, respondent has argued that the five-month waiting period provided by 42 U.S.C. 423(c)(2)(A) obviates the inconsistency between the court of appeals' decision and Congress's deliberate decision not to authorize benefits for short-term disabilities. See Br. in Opp. 11, 17-18. But Section 423(c)(2)(A) hardly eliminates that conflict. For one thing, as we have pointed out, the waiting period applies only to Title II's disability insurance program, 42 U.S.C. 401 *et seq.*, and does not apply to Title XVI's SSI program.

Even with respect to Title II, the waiting period hardly answers the concern. As explained above, Congress concluded in 1965 that even a *six-month* inability to work was the sort of short-term disability that should not qualify for benefits. See pp. 39-40, *supra*. For that very reason, Congress chose to require that the "worker be under a disability for a somewhat longer period," namely one year. See p. 40, *supra*. That judgment by Congress refutes the court of appeals' apparent assumption that the five-month waiting period furnishes the only protection that Congress included in the Act against converting the Title II disability program into a benefits program for short-term disabilities.

In any event, reliance on the five-month waiting period of 42 U.S.C. 423(c) misconstrues both the meaning and purpose of that provision. The waiting period provided by Section 423(c)(2)(A) does not address *whether* an individual suffers from a "disability"—an impairment of sufficient severity and duration to entitle him to benefits. Instead, it provides that a claimant who concededly *is* disabled within the meaning of the Act nevertheless is not entitled to benefits and cannot receive payments for the first five months of the period of disability. The five-month waiting period serves three purposes. First, it helps to save public resources and to lessen the drain on the Trust Fund. Second, it assists in administration by allowing the development of additional evidence; in some cases, Congress explained, the waiting period permits "temporary conditions to be corrected or to show definite signs of probable recovery" before potentially inappropriate payments are made. H.R. Rep. No. 1189, *supra*, at 6. Third, like a deductible on an insurance policy, it deters the submission of potentially insubstantial or unmeritorious claims. "[T]he fact that the worker frequently will be without income during [the waiting] period * * * would make it unprofitable for a person who could work not to do so." *Ibid.* The waiting period thus identifies the portion of the disability period during which a claimant will not receive benefits

despite being disabled and unable to work. It does not specify the length of time during which an individual must be unable to engage in substantial gainful activity in order to be found disabled, and thus eligible for benefits, in the first place.

Congress has recognized as much, and has consistently treated the waiting period and the disability period as distinct. For example, when Congress shortened the waiting period from six months to five in 1972, the House Report specifically noted that altering the waiting period would not shorten the required duration of the disability itself. Notwithstanding the one-month decrease in the waiting period, the House Report explained, "[n]o benefit is payable * * * unless the *disability* is expected to last (or has lasted) *at least 12 consecutive months* or to result in death." H.R. Rep. No. 231, *supra*, at 56 (emphasis added). Respondent's attempt to treat the waiting period as a replacement for the duration and severity requirements cannot be reconciled with either the text of the Act or Congress's manifest intent in enacting it.

II. SECTION 422(c)(2) DOES NOT PROVIDE A "TRIAL WORK" PERIOD WHERE THE CLAIMANT RETURNS TO SUBSTANTIAL GAINFUL ACTIVITY WITHIN 12 MONTHS OF THE ALLEGED ONSET OF HIS DISABILITY AND BEFORE BEING AWARDED BENEFITS

The court of appeals also erred in concluding that respondent was entitled to a "trial work period" under 42 U.S.C. 422(c) when the evidence at the time his claim was adjudicated showed that he had returned to substantial gainful activity within 12 months of the alleged onset of his disability. Under Section 422(c), a beneficiary who is entitled to benefits does not lose that entitlement by performing substantial gainful activity during the nine-month trial work period. The "period of trial work shall begin with the month in which [the claimant] becomes entitled to disability insurance bene-

fits." 42 U.S.C. 422(c)(3). That period ends after nine months of substantial gainful activity, or termination of the disability, whichever comes first. 42 U.S.C. 422(c)(4). "[A]ny services rendered by an individual during a period of trial work" are "deemed not to have been rendered by such individual in determining whether his disability has ceased in a month during such period." 42 U.S.C. 422(c)(2).

A. Reversal Of The Court Of Appeals' Ruling Concerning The Necessary Duration Of The Inability To Engage In Substantial Gainful Activity Requires Reversal Of Its Ruling On The Trial Work Issue

In this case, the court of appeals held that respondent was entitled to a trial work period because he became entitled to benefits under Title II after he was unable to engage in substantial gainful activity during the five-month waiting period. "[W]hether [respondent] is entitled to a trial work period, in light of his return to part-time work in May 1995 and SGA in October 1995," the court stated, "is conclusively settled by the determination that [respondent] was disabled and entitled to disability benefits" after that five-month period. Pet. App. 9a; see also *id.* at 10a (relying on the conclusion that respondent "was entitled to disability benefits as of April 1995"). For the reasons given in Point I above, however, the court of appeals erred in concluding that respondent was entitled to benefits merely because his underlying *impairment* lasted (or was expected to last) 12 months. Instead, the Commissioner properly determined that respondent was not entitled to disability benefits because, at the time his claim was adjudicated, his impairment had neither lasted nor was expected to last for the required minimum 12-month period at a level of severity that precluded substantial gainful activity. For that reason alone, the court of appeals erred on the trial work issue.

B. In Any Event, The Court Of Appeals Erred In Its Interpretation Of 42 U.S.C. 422(c) And 423(d)(1)(A)

1. Even putting that error to one side, the court of appeals' analysis (see Pet. App. 10a-13a) fundamentally misinterprets Section 422(c) and the "can be expected to last" language in Section 423(d)(1)(A), erroneously invalidating the Commissioner's trial work regulations as a result. The Commissioner has consistently construed Sections 422 and 423 as making a trial work period available only if the impairment has already precluded substantial gainful activity for 12 continuous months, or where there has been a determination that it can be expected to do so. See SSR 82-52; 20 C.F.R. 404.1592(d)(2) (as added by 65 Fed. Reg. at 42,787) ("You are not entitled to a trial work period" if "you perform work demonstrating the ability to engage in substantial gainful activity within 12 months of the onset * * * and before the date of any notice of determination or decision finding that you are disabled."). The Commissioner explained:

> Because section [422(c)] provides that a trial work period shall begin with the month in which a person becomes entitled to title II disability benefits, a claimant who does not become entitled to disability benefits cannot receive a trial work period. Under our interpretation of the duration requirement [in Section 423(d)(1)(A)], a person cannot be found to be under a disability if he or she performs work demonstrating the ability to perform substantial gainful activity within 12 months after onset and before we have issued any notice of determination or decision finding disability. * * * On the other hand, if a claimant returns to work before we have made a determination or decision finding disability, but more than 12 months from onset, the duration requirement may be satisfied * * *, the claimant may become entitled to benefits, and the work may be protected by the trial work period even though the work began prior to a finding of disability.

65 Fed. Reg. at 42,774.

That construction is fully supported by the Act's text and history. The Commissioner has concluded that, when determining whether an impairment preventing substantial gainful activity has lasted or can be expected to last for the required 12-month period, the decisionmaker should consider all evidence available at the time of the disability determination. See 65 Fed. Reg. at 42,780 (expectancy provision "can most reasonably be interpreted to mean that the time of adjudication is the relevant point of reference").[14] Where that

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[14] The Commissioner's conclusion that the date of the adjudication is the appropriate point of reference would appear to be compelled by the statutory text. Had Congress meant for the Commissioner to determine whether a disability was "expected to last" 12 months at some point in the past based solely on evidence available at that earlier time, it would not have made eligibility depend on whether the disabling impairment "can be expected"—present tense—to last 12 months. Instead, it would have made eligibility depend on whether the disabling impairment "could have been" or "was expected" to last that long. As the Commissioner observed: "If Congress had intended benefits to be awarded based on evidence that a claimant's impairment(s) did not in fact prevent substantial gainful activity for 12 continuous months, but only had been expected to do so at some earlier point in the 12-month period, we believe that Congress would have provided for a finding of disability based on an impairment(s) which *was* expected to last 12 months, in addition to one which *can be* expected to last 12 months." 65 Fed. Reg. at 42,780. In that regard, the court of appeals misquoted the pertinent statutory language in its holding, since it declared "that a claimant whose impairment * * * which 'lasted' of '*was* expected to last' for a continuous period of not less than twelve months may be disabled * * *. 42 U.S.C. § 423(d)(1)(A)." Pet. App. 8a (emphasis added). The statute actually uses the present tense, "can be expected," not the past tense, "was expected."

Moreover, requiring a determination of whether the inability could have been expected to last twelve months at some indeterminate point in the past would create a significant administrative burden. Decisionmakers would have to sift through a historical record and decide if, at some moment in the past, it would have been appropriate to predict that the inability to work would last 12 months—even if any such prediction would already have proven to be erroneous at the time of the adjudi-

determination takes place less than 12 months after the onset of the alleged disability, and the evidence shows that the impairment currently prevents substantial gainful activity, the adjudicator must decide whether the disabling impairment "can be expected to last" for the full 12-month period, *i.e.*, he must project the disability's expected duration. If the adjudicator determines based on the evidence that the inability to work by reason of the impairment can be expected to last for at least 12 months, the individual is disabled and "entitled" to disability insurance benefits, and a trial work period then "begin[s]" with the first month in which the individual became so entitled. 42 U.S.C. 422(c)(3). But when the evidence at the time the claim is adjudicated shows that the individual actually returned to (or became able to return to) substantial gainful activity within 12 months of the onset of the alleged disability, the adjudicator may rely on that evidence to conclude that the claimant's inability to work by reason of his impairment *already* has failed to last (and thus cannot be "expected" to last) for at least 12 months. In such a situation, the claimant has at no point "become[] entitled to disability insurance benefits" because he has not satisfied the duration requirement in the statutory definition of disability in Section 423(d)(1)(A), and the trial work period therefore never begins. *Ibid.*

That is precisely how Congress expected the process to function. Explaining the statutory text at issue here—"has lasted or can be expected to last"—the Senate Report on the 1965 amendments stated that, where "a worker has been under a disability which has lasted for less than 12 months, the bill would require only a prediction that the worker's disability will continue for a total of at least 12 calendar months after onset of the disability." S. Rep. No. 404, *supra*, at 99. Where the "disability has existed for 12 calendar months or

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cation. Nothing in the legislative record suggests that Congress intended to impose such a burden on the States or the Commissioner.

more" when the claim is adjudicated, the Report further explained, "*no* prognosis would be required." *Ibid.* (emphasis added). Instead, in that situation, the Commissioner may rely on the claimant's actual experience during the 12-month period when determining whether, at the time of the adjudication, the disability has lasted or can be expected to last the requisite duration. Similarly, no such prognosis would be required if, at the time the claim is adjudicated, the evidence shows that the impairment no longer prevents the performance of substantial gainful activity and did not do so for at least 12 months. See 65 Fed. Reg. at 42,774.

Responding to comments regarding this issue in the recent rulemaking proceeding, the Commissioner observed that Congress permitted the agency to find a disability "based on an impairment which 'can be expected to last' 12 months"—and did not limit the agency to finding disability where the impairment had *already* lasted 12 months—in order "to provide a means for [the agency] to adjudicate disability claims without having to wait 12 months from onset." 65 Fed. Reg. at 42,774. Nothing in the phrase "has lasted or can be expected to last at least 12 months," however, requires the Commissioner "to permit claims * * * in the face of specific evidence that the claimant's impairment did not in fact prevent him or her from engaging in substantial gainful activity for 12 continuous months." *Ibid.*

2. The court of appeals' contrary analysis is flawed. The court of appeals reasoned, in essence, that the Commissioner's regulation is contrary to the statutory language because it conditions entitlement to a trial work period on either a "finding of disability" or an actual inability to engage in substantial gainful activity for the 12-month period required by Section 423(d)(1)(A). Pet. App. 12a. The court rested that conclusion on its belief that the Act provides that the trial work period "shall begin" once the claimant is "eligible to receive benefits." *Ibid.* The court, however, misquoted the Act. The Act makes the trial work period begin

once an individual is "entitled" to benefits, not once he is "eligible." See 42 U.S.C. 422(c)(1). As explained above, an individual who, at the time the claim is adjudicated, has successfully engaged in substantial gainful activity before the expiration of the 12-month period is *not* "entitled" to benefits. Where the claimant never "becomes entitled to benefits," 42 U.S.C. 422(c)(1), the trial work period under Section 422 never "begin[s]."[15]

The court of appeals also thought it significant that, under the Commissioner's approach, entitlement to benefits (and thus to a trial work period) might sometimes be affected by when the claim is adjudicated. For example, if an adjudicator finds a claimant disabled following seven months of inability to engage in substantial gainful activity, based on a prediction that the claimant's inability to work will last at least an additional five months, the claimant receives benefits and a trial work period, even if the prediction later turns out to have been wrong and the claimant returns to work before the 12-month period has lapsed. In contrast, if the same claimant's request for benefits is adjudicated after the 12-month period has lapsed and the claimant successfully returned to work within the 12-month period, the claimant

[15] The court of appeals was also fundamentally mistaken when it stated that consideration of respondent's return to substantial gainful activity, in determining whether respondent was disabled, "was in contravention of the Act." Pet. App. 10a. Section 422(c)(2) does not prohibit consideration of the claimant's substantial gainful activity when determining whether a disability exists in the first instance. Instead, Section 422(c)(2) states that substantial gainful activity, if it occurs during the trial work period, is deemed not to have occurred when "determining whether his disability has *ceased* in a month during such period." 42 U.S.C. 422(c)(2) (emphasis added). See also H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 939 (1990) ("During this period, disabled beneficiaries may test their ability to work without affecting their entitlement to disability benefits. Any work and earnings are disregarded in determining whether the beneficiary's disability has ceased."). Section 422 thus addresses determinations of whether a disability has ceased, not whether the requirements for an initial finding of disability have been met.

would not be entitled to receive benefits or a trial work period.

As the Commissioner has explained, "the relatively infrequent, but regrettable, occasions in which" the timing of the adjudication affects the outcome are a "necessary" consequence of permitting the "SSA to adjudicate disability claims and award benefits without having to wait 12 months from onset," as well as the necessity of relying on potentially faulty predictions about an impairment's duration when doing so. 65 Fed. Reg. at 42,780. Simply put, the fact that some individuals may be awarded benefits (and trial work periods) based on predictions about the duration of their inability to engage in substantial gainful activity that turn out to have been incorrect in no way compels the Commissioner to award benefits to those individuals who, based on all the available evidence, clearly are *not* entitled to receive them. Certainly nothing in the Act compels the Commissioner to ignore evidence proving that the claimant's inability to engage in substantial gainful activity in fact did not last (and thus cannot be expected to last) the requisite period of time.

The court of appeals, however, appeared to suggest that the decisionmaker *must* ignore such proof and award benefits where, for example, the adjudicator knows that the claimant successfully returned to work before the 12-month period expired. There is no basis for reading such an exclusionary rule into the Act. In other legal contexts, evidence that develops after a claim is filed, but before it is adjudicated, is admissible even though the result may be that outcomes depend on when the adjudication takes place. For example, a plaintiff suing in tort for lost prospective wages will recover less if, after he is injured but before trial, he returns to work and thereby conclusively demonstrates that his earning capacity was not so greatly diminished as originally claimed. No one suggests that a jury would be precluded from taking such post-claim/pre-trial conduct into account merely because the evidence would not have been available

had the trial taken place earlier. Similarly here, there is no reason why the Commissioner should be barred from taking an applicant's post-claim return to work into account, where it bears directly on whether his inability to engage in substantial gainful activity by reason of the impairment has lasted (or can be expected to last) for at least 12 months.[16]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[16] The court of appeals' other reasons for rejecting the Commissioner's interpretation of the "can be expected to last" language in Section 423(d)(1)(A) also lack merit. First, the court rejected that interpretation because the Act does not explicitly mention adjudication as a prerequisite to a finding of disability. Pet. App. 13a. But the Act does permit a finding of disability when the impairment preventing substantial gainful activity "can be expected" to last 12 months. The Commissioner reasonably concluded that the relevant expectation is that of the decisionmaker, on the basis of the evidence available at the time of the disability determination. See p. 45 & note 14, *supra*. Second, the court observed that no other part of the Act "differentiates between claims adjudicated within twelve months, and claims adjudicated after twelve months." *Ibid.* But no other part of the Act contains similar statutory language regarding expectancies.

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In The

Supreme Court of the United States

JO ANNE B. BARNHART,
Commissioner of Social Security,

Petitioner,

v.

CLEVELAND B. WALTON,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR THE RESPONDENT

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether a claimant is entitled to disability benefits if he has a severe physical or mental impairment which has lasted or is expected to last at least 12 months, but he engages in substantial gainful activity within 12 months of his onset date.

2. Whether a claimant under Title II is entitled to a trial work period if he has a severe impairment which has lasted or is expected to last more than 12 months, even though he returns to substantial gainful activity after the five-month waiting period but within 12 months of his onset date.

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STATEMENT OF THE CASE

Cleveland Walton, a college graduate and teacher, was denied disability benefits, despite his continuing psychiatric impairment, for the sole reason that he returned to work (as a grocery store clerk), despite his continuing impairment, within 12 months of his October 1994 onset date. Walton's return to work occurred after he applied for benefits and after the five-month waiting period, but before his disability was adjudicated and before 12 months had elapsed from the date he first became disabled.

Walton was hospitalized with major depression, recurrent with psychotic features, in October 1990 and again in May 1994. Petition Appendix ("App.") 55a. After losing his job as a teacher in October 1994, Walton attempted a series of jobs, but he was fired from each after a brief work period. The Administrative Law Judge ("ALJ") therefore deemed them to be unsuccessful work attempts. App. 53a. Walton was hospitalized a third time in March 1995 and was diagnosed as suffering with paranoid schizophrenia. App. 56a. At the time of both administrative hearings in July 1996 and June 1997, the ALJ concluded that Walton had a "listing-level" psychiatric impairment. App. 59a, 45a. However, because Walton had worked as a grocery store clerk, beginning with part-time work in May 1995, and because he earned more than the substantial gainful activity ("SGA") level of $500 in October 1995, the ALJ, after the second hearing, found that Walton had not been prevented from engaging in SGA for

a continuous period of at least 12 months. The ALJ concluded that Walton was not under a disability and consequently was not entitled to benefits or a trial work period. App. 44a, 45a.

The Appeals Council and the District Court upheld the ALJ's conclusions. App. 36a-38a; App. 15a-26a. On appeal, the Court of Appeals for the Fourth Circuit affirmed the district court's holding that Walton had returned to SGA in October 1995, but reversed the district court's holding that Walton was not under a disability when he engaged in SGA within 12 months of his onset date and before adjudication of his claim. The Fourth Circuit also reversed the lower court's holding that Walton was not entitled to a trial work period. *Walton v. Apfel*, 235 F.3d 184 (4th Cir. 2000) (Luttig, J.); App. 2a, 7a.

SUMMARY OF THE ARGUMENT

Cleveland Walton is entitled to disability benefits and a trial work period because he meets the statutory definition of disability and because, beginning in April 1995, he met all the criteria for entitlement to disability benefits. Because he was entitled to benefits as of April 1995, once the five-month waiting period from his October 1994 onset date had elapsed, his return to work beginning in late May 1995 and his return to substantial gainful activity in October 1995 should be covered by a trial work period.

A person is disabled if he has an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which

can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The express language of the statutory definition of disability shows that it is the *impairment*, not the inability to engage in substantial gainful activity, which must last 12 months. The language of the statute is clear and unambiguous and therefore the Commissioner's contrary interpretation is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837 (1984). The Fourth Circuit's interpretation of the disability definition not only is supported by the plain language of the statute, but is also consistent with the legislative history of the Social Security Act, the regulatory scheme of Social Security pertaining to disability, the rulings of other courts of appeals and district courts which have considered the question, and Congress' frequently stated goal of encouraging disabled persons to try to return to work as early as possible. From the inception of the disability program, Congress has demonstrated its intention to encourage disabled persons to try to work, despite continuing severe impairments. This intent is reflected in the trial work statute, which makes a trial work period available from the first month of entitlement to benefits, and in the Supplemental Security Income ("SSI") special benefits program, which allows reduced SSI benefits to be paid to persons who, despite continuing severe impairment, are engaged in SGA.

The Commissioner apparently concedes the point that the definition of disability requires that the *impairment*, not the inability to engage in substantial gainful activity, must last 12 months. (Pet. Brief 23, 30). "By its

terms, Section 423(d)(1)(A) requires that the *impairment* have lasted or be expected to last 12 months (or result in death)." (Pet. Brief 23.) The Commissioner contends, however, that the statute is silent, and therefore ambiguous, about "how severe the impairment must be during that 12-month period. In other words, it does not specifically address whether the impairment must persist with such severity as to preclude all substantial gainful activity during the qualifying period – much less foreclose the Commissioner from construing the Act to embody such a requirement." (Pet. Brief 30.) The Commissioner asks that this Court, instead of reading the statute as written, read into the statute language that is not there and find ambiguity in a definition which is explicit in its terms. Under basic rules of statutory construction and the *Chevron* line of cases, this Court is bound by the language of the statute where that language is clear and unambiguous and cannot give deference to an agency's interpretation that is contrary to the clearly expressed intention of Congress.

Under the statute, a person is entitled to disability benefits, beginning with the first month after a five-month waiting period, if he is insured, has not attained retirement age, has filed an application, and is under a disability. 42 U.S.C. § 423(a)(1). Cleveland Walton met all these criteria: he was under a disability because he had an impairment that was expected to last – and in fact *did* last – more than 12 months and his impairment was of such severity as to prevent SGA; he was also insured, was under retirement age, and had filed an application. He was therefore entitled to disability benefits for each month beginning in April 1995, when the five-month

waiting period expired. Moreover, because Congress made a trial work period available from the first month an individual is entitled to benefits, 42 U.S.C. § 422(c)(3), Walton was entitled to a trial work period to cover his attempt to work beginning in late May 1995 and his return to SGA beginning in October 1995.

Even if this Court were to conclude that the 12-month duration requirement applies to the inability to engage in SGA as well as the impairment, Walton would nonetheless be entitled to disability benefits and to a trial work period. The expectancy language of the disability definition ("can be expected to last") and the prospective standard required by the language of the entitlement statute ("for *each* month beginning with the *first* month") must be given their full effect. Consequently, if prior to his return to work in May 1995, he had a "disability" or an inability to engage in SGA (as well as an impairment) which was expected to last 12 months, then, at that time, he was disabled. Because he also met all the other requirements of entitlement, he was also entitled to disability benefits. If he was entitled to disability benefits, then he was also entitled to a trial work period to cover his return to work.

Because construction of the statutory language, the legislative history of the statute, the administrative regulations adopted pursuant to the statute, prior case law, and sound policy all favor Walton's position, the decision of the Fourth Circuit should be upheld.

ARGUMENT

I. The Fourth Circuit Properly Concluded that It Is the Impairment, Not the Inability to Engage in SGA, Which Must Last 12 Months.

A. The Plain Language of the Statute Defining Disability Dictates that It Is the Impairment Which Must Last 12 Months.

"Disability" is defined by the Social Security Act and regulations as:

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months[.]

42 U.S.C. § 423(d)(1)(A). As the Fourth Circuit concluded, it is evident from the plain language of the statute that the phrase "which has lasted or can be expected to last for a continuous period of not less than 12 months" refers to the impairment, not to the inability to engage in SGA. App. 8a. The Fourth Circuit concluded: "The statutory language is unambiguous, requires no agency interpretation, and leaves no doubt that neither a duration requirement for the inability to engage in substantial gainful activity nor a requirement that the benefits have been 'awarded' or adjudicated, exists." App. 7a.

In reaching this conclusion, the Fourth Circuit noted:

> In addition to the facial clarity of the language, the grammatical structure and logic of the statute further compel the conclusion that the clause, 'which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months,' refers to the impairment, not to the inability to engage in SGA; the clause manifestly does not modify 'substantial gainful activity'.

App. 7a-8a. As the court properly concluded, it would be completely illogical to conclude that the inability to engage in substantial gainful activity could result in death. Yet the Commissioner has offered precisely such a reading of the statute in its policy as initially set out in Social Security Ruling ("SSR") 82-52: "It is the inability to engage in SGA because of the impairment that must last the required 12-month period." SSR 82-52.[1] Such a construction of the language is absurd, as the Fourth Circuit properly, and logically, concluded.

The Commissioner now concedes that, in fact, the statutory 12-month duration requirement *does* apply to the impairment, not to the inability to engage in substantial gainful activity. (Pet. Brief 23, 30.) "By its terms, Section 423(d)(1)(A) requires that the *impairment* have lasted or be expected to last 12 months (or result in death)." (Pet. Brief 23.) The Commissioner contends, however, that the statute

> does not speak directly to whether the impairment must persist during those 12 months at

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[1] The Commissioner also relies heavily upon new final regulations found at 65 Fed. Reg. 42,772 (2000). These regulations became effective August 10, 2000 and are inapplicable to this case. Moreover, the final regulations make clear that they are merely a continuation of the frequently rejected policy originally proffered in SSR 82-52: "[T]he revisions we are making clarify, but do not change, our interpretation set forth in SSR 82-52." 65 Fed. Reg. 42,780 (2000).

> any particular level of severity – in particular, whether it must be sufficiently severe to prevent substantial gainful activity. Nor does it specify how long the *disability* – the inability to work "by reason of" the impairment – must last. On those issues, Section 423(d)(1)(A) is ambiguous.

Id.[2]

The Commissioner's argument apparently is that Congress did not mean what it said and that additional language should be read into the statute so that the statute can be read in accordance with the Commissioner's longstanding policy. The Commissioner's argument is contrary to the most basic rule of statutory construction. As this Court said in *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted): "We have stated time and again that the courts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " "[W]hen "the statute's language is plain, 'the sole function of the courts' " – at least where the disposition required by the text is not absurd – 'is to enforce it according to its

[2] The Commissioner makes much of the "by reason of" language of the disability definition, suggesting that it demonstrates an "inextricable link" between the impairment and the resulting inability to work and that each must last 12 months. (Pet. Brief 16, 21, 23, 27, 30.) In fact, Social Security's own evaluation guide demonstrates that the "by reason of" linkage is intended to show that the inability to engage in SGA must result primarily from a medical impairment, not from economic conditions, hiring practices, etc. Disability Ins. State Manual § 314 (Sept. 9, 1965). The "by reason of" language implies nothing about duration.

terms.' " *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citations omitted) (concluding that because the most natural reading of the bankruptcy statute extended recovery rights only to the trustee, petitioner's burden of persuading the court that the section should be read to extend rights to others was "exceptionally heavy"). "In analyzing a statute, we begin by examining the text, not by 'psychoanalyzing those who enacted it'." *Carter v. United States*, 530 U.S. 255, 271 (2000) (citations omitted). *Accord Duncan v. Walker*, 121 S.Ct. 2120, 2124 (2001) ("Our task is to construe what Congress has enacted."). In the case at bar, the literal reading of the statute produces a result that is not only not absurd, but is fully consistent with the intentions of the drafters. The petitioner has not and cannot meet her "exceptionally heavy" burden (*Hartford Underwriters*, 530 U.S. at 9) to persuade the court to construe the language to extend the 12-month requirement to the inability to engage in SGA.[3]

[3] The Commissioner attempts to couch this basic and indisputable rule of statutory construction into the guise of a maxim "expressio unius est exclusio alterius," which neither the Court of Appeals nor Walton ever asserted, and then to disparage that maxim as being inapplicable in the administrative law context. (Pet. Brief 36-37.) According to Black's Law Dictionary, "expressio unius est exclusio alterius" is a maxim of statutory interpretation "which means that the expression of one thing is the exclusion of another." This case is unlike those cases offered by the Commissioner to show the questionable reliability of the maxim. This is not a case where the recitation of certain prohibitions is said to imply that other activities must therefore be allowed, *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, 940 F.2d 685 (D.C. Cir. 1991), or where the delineation of two methods of rebuttal arguably excludes other

In drafting the definition of "disability," Congress was defining a core concept of the Social Security Act. It surely did not take lightly the responsibility to carefully define this key term. Congress could easily have drafted the definition to say what the Commissioner would like it to say, by simply stating that disability is:

> the inability to engage in any substantial gainful activity which has lasted or can be expected to last for a continuous period of not less than 12 months and which is caused by any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

That Congress easily could have drafted the disability definition in such a way but did not is *not* an indication that the statute is ambiguous, but rather is clear evidence that Congress meant what it says in the statute – that is, that the impairment must be severe and it must be expected to last 12 months or to result in death.

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unspecified rebuttal methods, *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 703-4 (1991), or where the direction of something in one provision and its absence in another is used to imply the intent to negate it in the second context, as in *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 68 (D.C. Cir. 1990). To the extent the expressio unius maxim is relevant at all, its force should depend on the context and on whether, considering the structure of the statute and its legislative history, one can be confident that the draftsman in expressing one thing would likely have considered the alternatives which are arguably precluded. *Shook v. District of Columbia Fin. Responsibility and Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998).

The Commissioner suggests that the court of appeals' analysis ignores the text of 42 U.S.C. § 423(d)(2)(A), which requires that the impairment be of such severity as to render the person unable to perform any substantial gainful activity. (Pet. Brief 16, 24, 31.) Petitioner's argument is without merit. Walton has never denied the existence of a severity requirement, and there is no basis for any suggestion that he does not satisfy it. In fact, the regulation defining the "Listing of Impairments" explicitly states that the "Listing of Impairments describes, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing *any* gainful activity." 20 CFR § 404.1525(a) (emphasis added). By definition, a listing-level impairment, which Walton clearly has, meets the severity requirement set out in § 423(d)(2)(A). Moreover, because that section does not link the required severity to the 12-month duration requirement, the argumenf does nothing to advance the Commissioner's position.

The Commissioner argues that because the statute says nothing about the duration of an applicant's ability to engage in substantial gainful activity, the statute is ambiguous on that point, leaving a "gap" for the administering agency to fill. (Pet. Brief 23, 30). Although a statute's failure to address an issue may in some circumstances reflect an ambiguity or gap, that is not the case here. This statute states very clearly that disability means two things: an impairment satisfying the durational requirement, and a resulting inability to engage in substantial gainful activity. A person satisfying this definition, as well as the other statutory eligibility requirements, is entitled to benefits. A statute that says

that a person *is entitled* to something if he possesses specific defining characteristics is not "silent" about whether additional substantive requirements must be met; rather, it forecloses the possibility that such additional requirements may be imposed. As this Court has put it, "As a rule, 'a definition which declares what a term 'means' excludes any meaning that is not stated.' " *Colautti v. Franklin*, 439 U.S. 379, 392-93 n.10 (1979) (citation omitted); *see also Meese v. Keene*, 481 U.S. 465, 484 (1987) ("It is axiomatic that the statutory definition of a term excludes unstated meanings of that term.").

The government's extrastatutory addition of a durational requirement for the inability to engage in SGA does not simply fill a hole in the statutory language; it directly contradicts the statute. The statute says that if a person satisfies criteria A and B, he or she is disabled. The government's "interpretation" says that such a person is not disabled unless he or she satisfies an additional criterion, C. The government would thus deny benefits to an applicant who met the statutory criteria that entitled him to receive them, contrary to the plain meaning of the statute.

The statute must be read as it is written, and the agency's attempt to read additional language into the statute is not entitled to deference. In *Chevron, U.S.A., Inc. v. Natural Resources Defense*, this Court clearly stated: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S.

837, 842-43 (1984). Only if "the statute is silent or ambiguous with respect to the specific issue" must the court look at whether the agency's answer is based upon a "permissible construction of the statute." *Id.* The Court of Appeals properly found that the agency interpretation of the Act was not appropriate in this case because the language of the statute "is clear and unambiguous. Moreover, even if interpretation were required, the Commissioner's interpretation – which assumes either a duration period or adjudication requirement and does violence to the grammatical structure of the statute – conflicts with the very statute it purports to elucidate. We are bound to reject such constructions." App. 6a-7a.

This Court has noted that "the courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy Congress sought to implement." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). This Court has also recognized that "[e]ven contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989). The Fourth Circuit properly concluded that the Commissioner's construction of the statute was inconsistent with the plain language of the statute. The Commissioner's interpretation, therefore, is entitled to no deference.

Other courts, construing the statutory language at issue, also have determined that the statutory language is so clear that the agency's interpretation is not entitled to

deference. *See*, e.g., *Salamalekis v. Comm'r of Soc. Security*, 221 F.3d 828 (6th Cir. 2000); *Hunter v. Department of Health & Human Services*, 851 F.Supp. 75, 77 (E.D.N.Y. 1994) ("On its face, S.S.R. 82-52 contradicts the plain language of the Social Security Act's definition of 'disability.' "); *Fabel v. Shalala*, 891 F.Supp. 202, 206 (D.N.J. 1995) ("Despite this level of deference, the Court finds the SSR 82-52 is plainly erroneous and inconsistent with the Act."); *Walker v. Sec'y of Health & Human Services*, 943 F.2d 1257, 1260 (10th Cir. 1991) (rejected agency's policy as "inconsistent with the language of the Act and, therefore . . . entitled to no deference.").

Congress has explicitly defined disability in such a way that the 12 month duration requirement applies only to the impairment. It is "beyond the permissible limits of administrative interpretation," *Social Security Board v. Nierotko*, 327 U.S. 358, 369-70 (1946), for the Commissioner to construe the Act to *add* a requirement that the inability to perform SGA also last 12 months. (Pet. Brief 30.) Congress cannot be said to have so inartfully drafted its one-sentence definition of disability. Instead, this Court must give effect to the statute *as written*, and, as written, the 12 month duration requirement applies to the impairment, not to the inability to engage in SGA.

B. This Interpretation of the Statute Is Consistent With the Legislative History of the Act.

Because the statute's language is clear and plainly forecloses the government's position, there is no need to resort to legislative history in this case. As this Court has repeatedly emphasized, while "[l]egislative history can

be a legitimate guide to a statutory purpose obscured by ambiguity," statutory language "must ordinarily be regarded as conclusive." *Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (citations and internal quotations omitted). Thus, "there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' " *Ex parte Collett*, 337 U.S. 55, 61 (1949) (citation omitted). Here, where the statutory language is precise and unambiguous, and the legislative history relied on by the government consists primarily of what appear to be imprecise descriptions of the effect of the statute in committee reports (many of which postdate enactment of the relevant language), the Court should not be deflected from enforcing the statute as enacted.

In any event, the plain language of the statutory definition of disability is consistent with the legislative history surrounding the extension of Social Security to cover disabled workers in 1956. As the Commissioner's brief points out, the Social Security Act did not initially cover disabled workers but was amended in 1956 to add a system of disability benefits. Initially, disability was defined as "the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration." 42 U.S.C. § 423(c)(2) (1958). Congress added disability benefits and included a "disability freeze" to

exclude periods of disability for purposes of determining insured status and calculating retirement benefits.

Congress' intent as it defined disability for the first time is instructive:

> There are two aspects of disability evaluation: (1) There must be a medically determinable impairment of serious proportions which is expected to be of long-continued and indefinite duration or to result in death, *and* (2) there must be a *present* inability to engage in substantial gainful work by reason of such impairment. . . . Disability must have lasted for 6 months before it may be considered. This provision is intended to exclude from consideration temporary *conditions* which *terminate* within 6 months.

S.Rep. No. 83-1987 (1954), *reprinted in* 1954 U.S.C.C.A.N. 3710, 3730 (emphases added). It is clear from this statement that Congress did not intend to cover temporary impairments which might medically improve. The Senate Report went on to make even more explicit that it was the duration of the impairment, not the duration of the inability to engage in SGA, that concerned Congress:

> In prescribing that the freeze apply only in the case of impairments "which can be expected to be of long-continued and indefinite duration" your committee seeks to assure that only long-lasting *impairments* are covered. This provision is not inconsistent with efforts toward rehabilitation since *it refers only to the duration of the impairment and does not require a prediction of continued inability to work.*

Id. at 3730 (emphases added). This statement reflects Congress' concern from the very beginning of the disability

program that disabled persons be encouraged to return to work as early as possible. It is also evident that the definition of disability was intended to rule out short-term *impairments* whose symptoms might improve within a short period of time, not to rule out the truly disabled who, by true grit, attempt to work despite continuing severe impairment.

Significantly, when the disability definition was revised in 1965 to replace the "long-continued and indefinite duration" requirement with the current language requiring that the impairment "can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months," this change was considered to be a liberalization of the disability definition which would add approximately 60,000 persons to the disability rolls. S.Rep. No. 89-404, *reprinted in* 1965 U.S.C.C.A.N. 1943, 1945. Once again, it was clear that Congress was concerned about excluding short-term *impairments*: "The effect of the provision the committee is recommending is to provide disability benefits for a totally disabled worker even though his *condition* may be expected to improve after a year." *Id.* at 2039. The Conference Report No. 89-682 makes this explicit: "Under Senate amendment No. 312, the *impairment* must be one which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." *Id.* at 2249 (emphasis added).[4]

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[4] Petitioner contends that Congress should be deemed to have ratified the Commissioner's policy by amending the Act over the years without changing the Commissioner's

It is clear from the Congressional reports when the disability program was first implemented and when the

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construction. (Pet. Brief 33, 36, 38.) The Commissioner cites *Lorillard v. Pons*, 434 U.S. 575 (1978), in support of its position. However, *Lorillard* and subsequent cases of this Court, noted that Congress is presumed to be aware not only of the administrative interpretation of the statute but also the *judicial* interpretation of the statute ("we cannot assume . . . that Congress was unaware that courts had uniformly afforded jury trials under the FLSA." *Id.* at 585.) Similarly, this Court in *Bragdon v. Abbott* was persuaded by the uniformity of the administrative *and judicial precedent* which had consistently interpreted the statutory provision at issue in that case. 524 U.S. 624, 645 (1998). *See also, Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994); *Williams v. Taylor*, 529 U.S. 420 (2000). The Commissioner's policy, in contrast, has been sharply at odds with judicial interpretations of the statutory provisions. Consequently, any failure to change the statute could just as easily demonstrate Congress' decision to ratify the *courts'* interpretation of the existing statutory language. Moreover, this Court has, on many occasions, expressed its skepticism regarding supposed congressional acquiescence to the agency's position. "Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care . . . Because 'subsequent history is less illuminating than the contemporaneous evidence,' respondents face a difficult task in overcoming the plain text and import of" the statute. *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 169-70 (2001) (citation omitted). "Absent . . . overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation." *Id.* at 170, n.5. *See also Alexander v. Sandoval*, 121 S.Ct. 1511, 1523 (2001) (congressional acquiescence "as a general matter . . . deserves little weight in the interpretive process." (citation omitted)). The Commissioner has fallen far short of establishing overwhelming evidence of Congressional acquiescence in this case.

definition of disability was amended in 1965 that Congress' concern has always been that persons with truly short-term impairments, from which they may quickly recover, not be covered by the Act, but that persons with long-term serious impairments should be covered and should be encouraged to return to work as soon as possible. The Commissioner suggests that the Court of Appeals offered "no plausible reason why Congress would have insisted that the underlying impairment last for 12 months but not the claimant's inability to work 'by reason of' that impairment." (Pet. Brief 29.)[5] To the contrary, that reason was explicitly stated by Congress when the disability program was first initiated. Congress did not want to cover persons with impairments from which they would quickly recover, but Congress did want to encourage disabled persons to try to return to work as early as possible. Congress accommodated these competing concerns – to restrict coverage and to encourage the disabled to try to work – by requiring that the *impairment* be expected to last at least 12 months, but *not* requiring that the inability to engage in SGA last 12 months.

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[5] The Commissioner would also have Walton identify a specific provision in the Act that expressly states that there is no duration requirement for the inability to engage in SGA or a provision which states that the impairment need not persist at a disabling level of severity for the 12 month period. *Id.* at 29. Such a directive is absurd because it essentially asks Walton to prove the negative. Congress cannot be expected to draft legislation to explicitly state what it did *not* intend. The language of the statute expresses what Congress *did* intend and that language must be accorded full meaning.

Congress' judgment is expressed unambiguously in the statutory language and in the legislative history, and must not be disturbed by this Court simply because the Commissioner's policy is at variance with Congressional purpose.

C. The Separation of the Duration Requirement (Applicable Only to the Impairment) and the Severity Requirement Is Consistent with Social Security's Own Regulatory Scheme.

Other Social Security regulations that further define the disability statute confirm that it is the impairment, not the inability to engage in SGA, which must last 12 months.

> Unless your *impairment* is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months. *We call this the duration requirement.*

20 CFR § 404.1509; 20 CFR § 416.909 (emphases added). This is quite explicit language, clearly linking the 12-month requirement to the impairment, not to the inability to engage in SGA.

Moreover, the regulation describing the purpose of the Listing of Impairments expressly distinguishes between the severity of an impairment and its duration:

> The Listing of Impairments describes, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity. Most of the listed impairments are permanent or expected to result in death, or a specific statement of duration is made. For all others, the evidence must

> show that the impairment has lasted or is expected to last for a continuous period of at least 12 months.

20 CFR § 404.1525(a). The distinction between the severity and duration requirements is also reflected in 20 CFR § 404.1520(a), regarding the evaluation of disability in general, which states:

> Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled.

The only regulations that attempt to show that the inability to engage in SGA must be expected to last 12 months are the new 2000 regulations, based upon SSR 82-52 and a 1995 Notice of Proposed Rulemaking, 60 Fed. Reg. 12,166 (1995), which did not go into effect until August 2000 (while this and other litigation was pending). 65 Fed. Reg. 42,772 (2000). The new regulations are contrary to the express language of the statute, contradict various pre-existing and co-existing regulations, and therefore are entitled to no deference.

D. Most Courts Which Have Interpreted the Language of the Statute Have Concluded that the 12-Month Duration Requirement Applies to the Impairment, Not the Inability to Perform SGA.

Most of the courts which have interpreted the language of the disability definition have agreed with the Fourth Circuit's conclusion that the 12-month duration requirement applies to the impairment, not the inability to perform SGA. The Massachusetts District Court in *White v. Finch* carefully construed the language of the

disability statute (noting the grammatical structure and the common sense logical interpretation of the language), the legislative history, the administrative regulations, prior case law, and sound policy considerations (including encouraging work) to conclude that the impairment, not the inability to work, must last 12 months. 311 F.Supp. 307 (D.Mass. 1970).

The Fifth Circuit ruled on the issue in *Singletary v. Bowen*, holding that the Commissioner's position

> evidences a misunderstanding of the duration requirement. It confuses the duration requirement, which applies only to the impairment, with the severity requirement, which determines whether the impairment prevents the claimant from working . . . The statute quite clearly requires that it is the impairment only which must last for a continuous period . . . The statute . . . does not require that a claimant be unable to engage in work during the entire 12 month period.

798 F.2d 818, 821 (5th Cir. 1986). The Seventh Circuit also rejected the government's view:

> When an individual has been disabled for five consecutive months and suffers from an impairment which can be expected to last for a continuous period of twelve months, that person is entitled to disability benefits . . . The Act attempts to strike a balance between paying benefits to people who are disabled and encouraging them to return to work as soon as physically possible.

McDonald v. Bowen, 818 F.2d 559, 563-64 (7th Cir. 1986).

Likewise, the Sixth Circuit in *Salamalekis*, 221 F.3d at 833, rejected SSR 82-52 as inconsistent with the plain language of the Act.

> Salamalekis had not recovered completely from his impairment when he returned to work [within 12 months of onset] . . . As the agency itself found, Salamalekis's impairment was expected to last for 12 months as of March 2. This finding is not invalidated by Salamalekis's effort to return to work.

See also Jenkins v. Heckler, 783 F.Supp. 998, 1001 (D.S.C. 1992) ("the Secretary's premise that the plaintiff must be unable to work for twelve continuous months in order to be adjudicated 'disabled' is erroneous."); *Hassan v. Apfel*, 2000 U.S. Dist. LEXIS 16953 (S.D.N.Y. 2000) (holding that the ALJ erroneously found that claimant was not disabled because she had returned to work within 12 months of onset).

Significantly, the Commissioner has been able to muster only four cases that she says support her position. (Pet. Brief at 28.) Of these, surprisingly, one is *McDonald v. Bowen*, which clearly holds that a claimant is entitled to disability benefits and to a trial work period despite her return to work within 12 months of the onset of her impairment. 818 F.2d at 564. Moreover, *Estep v. Richardson*, is inapposite, because it only concluded that the claimant's *impairment* had not lasted 12 months. 459 F.2d 1015 (4th Cir. 1972). *Estep* is not a case, such as Walton's, where a person returned to work within 12 months of onset despite a continuing severe impairment. In sharp contrast to the *Estep* facts, it is undisputed that Walton's impairment continued at listing-level severity at the time

of his second hearing in June 1997, nearly three years after onset.

The Commissioner's two remaining cases, *Alexander v. Richardson*, 451 F.2d 1185 (10th Cir. 1971), *cert. denied* 407 U.S. 911 (1972), and *Titus v. Sullivan*, 4 F.3d 590 (8th Cir. 1993), are unpersuasive. In determining that inability to engage in SGA and the impairment must both last 12 months, these courts blurred the distinction between the duration requirement and the severity requirement that is set out in the statutory language, the legislative history, and the regulations. The *Alexander* court reasoned that the "[i]nability to engage in any gainful activity and the impairment which causes it cannot be separated. The two components of disability must exist at the same time." 451 F.2d at 1186. While the statute does require that the severity requirement (inability to engage in SGA) and the duration requirement exist at the same time, it does not require that they coexist for 12 months. In addition, the facts of *Alexander* and *Titus* suggest that no consideration was given to the availability of a trial work period, or to the expectancy language (*see infra* pp. 29-30) and the need to consider the entitlement criteria prospectively from the point of application and to award benefits – and a trial work period – from the first month all eligibility criteria are met (*see infra* pp. 31-33).

In addition, *Alexander* and *Titus* have been effectively, though not explicitly, overruled. The Tenth Circuit in *Walker v. Sec'y of Health & Human Services*, 943 F.2d 1257 (10th Cir. 1991), and the Eighth Circuit in *Newton v. Chater*, 92 F.3d 688 (8th Cir. 1996), construed the statutory language to provide that benefits *are* payable and a trial work period *is* available if an impairment was expected

to last at least 12 months, even if the return to work occurred within 12 months of onset. "[A] fair reading of the Act indicates that an individual who suffers from an impairment that has lasted, or is expected to last, twelve months is entitled to disability insurance benefits, as well as a trial work period, after waiting five months." *Walker*, 943 F.2d at 1260; *accord*, *Newton*, 92 F.3d at 694 ("[U]nder the statute, a claimant need not have had a disability for twelve consecutive months before he may test his ability to work."). Admittedly, in *Walker* and *Newton*, the claimants' return to work actually occurred more than 12 months after onset. Nonetheless, the *Walker* and *Newton* courts' construction of the statutory language accords with the rulings of three other courts of appeals and many district courts in finding that benefits are payable and a trial work period is available despite a claimant's return to work within 12 months of onset. *See infra* pp. 37-40.

E. Policy Considerations Weigh in Favor of Walton's Position that the 12-Month Duration Requirement Applies to the Impairment, Not to the Inability to Perform Substantial Gainful Activity.

Walton's position that the 12-month duration requirement applies to the impairment, not the inability to engage in SGA, properly accommodates the competing policies of excluding those who are not truly disabled and encouraging those who are disabled to attempt to work. The Commissioner's suggestion notwithstanding, Pet. Brief 17, Walton's position is fully consistent with Congress' deliberate decision not to provide benefits in

cases of short-term, temporary disability. The dual requirements that the impairment be expected to last 12 months and that it be of such severity as to preclude SGA, in combination, eliminate short-term, transient disabilities from coverage. Some impairments, although of long-term duration -- e.g., controlled hypertension – are never so severe as to prevent SGA and therefore do not meet the severity requirement, while other impairments, although of substantial severity at the outset, would never be expected to last 12 months and consequently do not meet the duration requirement. In either instance, the applicant would be denied disability benefits. In sharp contrast, Walton's listing-level schizophrenia is an impairment which satisfies both criteria: by definition, it is of such severity as to prevent SGA, and it is of documented long-term duration.

Encouraging disabled claimants, like Cleveland Walton, to try to work, despite continuing severe impairment, not only is good public policy, but also implements the explicit language of the statute and clearly stated Congressional goals.

II. A Claimant is Entitled to Disability Benefits and to a Trial Work Period If He Meets All Other Requirements of Entitlement and the Five-Month Waiting Period Has Elapsed, Even Though He Returns to Substantial Gainful Activity Within 12 Months of Onset.

A. According to the Plain Language of the Statute and Supporting Regulations, an Individual Is Entitled to Benefits and a Trial Work Period If He Returns to SGA Within 12 Months of Onset.

A trial work period "is a period during which you may test your ability to work and still be considered

disabled." 20 CFR § 404.1592(a); 42 U.S.C. § 422(c)(2). "A period of trial work for any individual *shall begin with the month in which he becomes entitled* to disability insurance benefits[.]" 42 U.S.C. § 422(c)(3) (emphasis added); 20 CFR § 404.1592(e).

The requirements for entitlement to disability benefits are set out in 42 U.S.C. § 423(a)(1) ("the entitlement statute"):

> Every individual who –
>
> (A) is insured for disability insurance benefits . . . ,
>
> (B) has not attained retirement age . . . ,
>
> (C) has filed an application for disability insurance benefits, and
>
> (D) is under a disability (as defined in subsection (d) of this section),
>
> shall be entitled to a disability insurance benefit (i) *for each month beginning with the first month after his waiting period* (as defined in subsection (c)(2) of this section) in which he becomes so entitled to such insurance benefits[.]

42 U.S.C. § 423(a)(1) (emphasis added); *see also*, 20 CFR § 404.315(a); 20 CFR § 404.320(b).

The statute and the regulations[6] make clear that a claimant is "entitled" to disability benefits beginning

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[6] The new regulations which the Commissioner presents in support of her position were not effective until August 2000. Moreover, they conflict with the express language of the statute and with other pre-existing regulations and are therefore not entitled to deference.

with "the *first* month covered by your application in which you meet all the other requirements for entitlement." 20 CFR § 404.316(a) (emphasis added); 20 CFR § 404.321(a).

There is no requirement that a claimant wait 12 months before becoming "entitled" to benefits. "Congress could have easily required, as does S.S.R. 82-52, a waiting period of a year before awarding any benefits. But it is evident from an analysis of the statute that, as a matter of policy, it chose not to do so." *Hunter*, 851 F.Supp. at 77.

Based upon the plain language of the statute and regulations, Walton was "entitled" to disability benefits, and consequently to a trial work period, beginning in April 1995, before he began his attempt to work at Food Lion, because at that time he met all the requirements for entitlement status: he was insured; he had not reached retirement age; he had applied; and he had been disabled for five consecutive months. He had a disability as defined by 42 U.S.C. § 423(d)(1)(A) because he had a severe mental impairment which was expected to last for a continuous period of at least 12 months.[7] Because Walton met all the criteria in April 1995, he was "entitled" to disability benefits beginning that month; and therefore, according to the plain language of the statute and supportive regulations, he was also entitled, at that time, to a trial work period.

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[7] A medical expert concluded prior to Walton's first hearing that Walton's impairment had lasted or could be expected to last at least 12 months. Dist. Ct. Record 261.

The Commissioner effectively concedes that if the duration requirement does not apply to the inability to engage in SGA, the Fourth Circuit's ruling on the trial work period must be sustained as well, since the principal basis for the government's attack on the trial work period ruling is its argument that the Fourth Circuit's construction of the duration requirement was erroneous. (Pet. Brief 43.) But even if the government were correct on the duration issue, the availability of a trial work period under the facts of this case is *not* dependent upon a finding that the 12-month duration requirement applies only to the impairment. Rather, the expectancy language of the disability definition and the prospective perspective required by the entitlement statute, in combination, assure that a trial work period *is* available in this case even if the 12-month duration requirement is found to apply to the inability to engage in SGA.

The expectancy language of the disability definition must be given full effect. "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." *Market Co. v. Hoffman*, 101 U.S. 112, 115-6 (1879). To ignore the "can be expected to last" language leads to a result that is both contrary to the language of the statute and regulations, and patently unfair and arbitrary on its face. The Commissioner notes that the Agency could decide a claim within 12 months of onset and apply the "can be expected to last" language to approve benefits. (Pet. Brief 48-49.) The Commissioner apparently concedes that benefits paid based upon an expectancy could not be recouped even if the person returned to work

within 12 months of onset. Indeed, the Commissioner must concede this point, for to do otherwise would effectively eliminate the "can be expected to last" provision from the statute and replace the five-month waiting period with a 12-month waiting period, contradicting the explicit statutory language and the expressed intention of Congress.[8]

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[8] The Commissioner's concession that benefits paid based upon an expectancy cannot be recouped even if the person returns to SGA within 12 months of onset is consistent with case law. The Sixth Circuit considered this problem in *Sierakowski v. Weinberger*, 504 F.2d 831 (6th Cir. 1974), where a claimant, who had been approved for disability benefits based upon the expectation that his impairment would last more than 12 months, returned to work within 12 months of his onset date. The Appeals Council concluded that he was never entitled to benefits because he had returned to work within 12 months of onset. The Sixth Circuit, however, held that Sierakowski's return to work did not oblige him to repay the benefits he had received. "The result reached by the Secretary and by the District Court is to read into the statute a provision for the conditional payment of benefits, repayable where the expected duration does not develop . . . We find nothing in the statutory language to support such a view, and much in the legislative history to refute it. The statute plainly says that it permits benefits where the inability "can be expected to last for a continuous period of not less than twelve months." We conclude that by the use of the cited language the Congress established a prospective standard whereas the Secretary urges one governed by hindsight. . . . We recognize that the construction urged by the Secretary results perhaps in more certainty and is thus easier of application, but this does not, in our view, justify a departure from Congressional intent. Furthermore, that construction tends to penalize good faith and diligence. It takes little imagination to conclude that a claimant less motivated than plaintiff here would be sorely tempted to sit out the full twelve months if he knew that the law imposed such a forfeiture for an earlier return

The language of the entitlement statute requires that a *prospective* perspective be used from the date of application to assess whether all five prerequisites are met. The statute dictates this result by stating that benefits must be payable from the *first* month that all requirements are met, including passage of the five-month waiting period.[9] The courts have also recognized this prospective standard. "Although the requirement of a twelve month continuous disability is 'forward-looking and is not to be nullified by hindsight,' it is evident that it is *forward-looking from the point an application is filed.*" *Nappa v. Sec'y of U.S. DHHS*, 731 F.Supp. 579, 585 (E.D.N.Y. 1990) (emphasis added). *See also Salamalekis*, 221 F.3d at 832; *Hassan v. Apfel*, 2000 U.S. Dist. LEXIS 16953 (S.D.N.Y. 2000); Acquiescence Ruling ("AR") 92-6(10), AR 98-1(8), AR 00-5(6) (to establish eligibility for Title II benefits and a trial work period, claimant must establish that "at the

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to gainful activity." *Id.* at 833-35. *See also Kendrick v. Califano*, 460 F.Supp. 561 (E.D. Va. 1978).

[9] Even Social Security's early guidelines recognized this prospective standard. Noting that the long-continued and indefinite requirement refers only to the expected duration of the impairment when viewed as of the application date, the agency stated that where the medical evidence initially submitted establishes a condition which precludes SGA and which is expected to be of long-continued and indefinite duration as of the application date, a report that the claimant later recovered or returned to work after the application "would not be deemed to relate back and reflect on the individual's condition on the application date." OASI Disability Ins. Letter No. 39 at 1, 4 (Pt. V of the Disability Ins. State Manual) (Jan. 22, 1957).

time he/she returned to work and thereafter, the impairment was still expected to last for at least 12 consecutive months from the date of onset").

When Walton filed his application, and when the five-month waiting period expired, he had an impairment – *and* an inability to engage in SGA – which was expected to last 12 months. Therefore, he was entitled to disability benefits and to a trial work period once his five-month waiting period expired. To consider the requirements in hindsight after the 12 months have passed is contrary to the statute because it fails to award benefits in the first month in which all the statutory requirements are satisfied and in each successive month thereafter. Moreover, it reads into the statute a 12-month waiting period, which Congress neither imposed nor intended.

Even though the Commissioner's policy apparently allows a claimant already approved for benefits to retain those benefits if he returns to work within 12 months of onset, the policy is nonetheless unfair and arbitrary with respect to those claimants, like Walton, whose disability is not finally adjudicated within 12 months of onset. They are treated differently for the sole reason that Social Security did not adjudicate their case in a timely manner. As the Fourth Circuit noted, neither § 423(a)(1) nor § 423(d) mentions adjudication as a prerequisite to disability or entitlement to disability benefits. App. 13a. Similarly, the Sixth Circuit in *Salamalekis* refused to make the award of benefits, a factor dependent upon agency conduct, an additional prerequisite to trial work eligibility, finding such a prerequisite to be contrary to Congress' unambiguous intent. 221 F.3d at 833-4. *See also*

Hunter, 851 F.Supp. at 77 ("The point at which the Secretary comes to acknowledge the existence of a disability is not and should not be a consequential factor in the calculus of entitlement, let alone a determinative one."). Contrary to the Commissioner's contention that such a result is a "necessary consequence" of allowing Social Security to decide claims without having to wait 12 months from onset, (Pet. Brief 49), proper application of the entitlement statute eliminates these unfair consequences by awarding benefits in the first and each successive month in which all criteria of entitlement are met, regardless of when the claim is finally adjudicated.

B. This Construction of the Statute and Regulations Is in Accordance with the Legislative History of Title II and Title XVI Work Incentives.

The legislative history of the disability provisions of the Social Security Act demonstrates that Congress has, from the very beginning, sought to encourage disabled claimants to return to work as early as possible. This goal is clearly reflected in the express language of the trial work period statute, which makes a trial work period available from the very first month of entitlement to disability benefits. From the first extension of the Social Security program to disabled workers in 1956, there were provisions for referral of handicapped persons to state vocational rehabilitation programs, "to the end that as many disabled individuals as possible may be restored to gainful work." S.Rep. No. 83-1987 (1954) *reprinted in* 1954 U.S.C.C.A.N. 3710 at 3712, 3786, 3729.

When the Social Security Act was amended in 1960, Congress broadened the trial work period to include those who rehabilitated themselves or who worked under rehabilitation plans other than the state rehabilitation agencies. "The committee believes that the broadening of the trial-work period will be an incentive to greater rehabilitation efforts." S.Rep. No. 86-1856 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3619, 3623. The amendments also provided for disability benefits to be paid, without a second waiting period, for those whose disability recurred relatively soon after termination of benefits. "This will encourage disabled persons to return to work even though there may be question as to whether their work attempts will be successful. Most disability insurance beneficiaries who return to work do so despite severe impairments," which make the loss of a job and the recurrent need for disability benefits more likely. *Id.* at 3624.

Even when it tightened up the disability standard in the 1967 amendments, Congress maintained the trial work provisions:

> Paragraph (4) of the new section 223(d) directs the Secretary by regulations to prescribe the criteria for determining when services or earnings demonstrating ability to engage in substantial gainful activity, and provides that an individual whose work or earnings meet these criteria will be found not to be disabled (*except in the case of work performed during a 'period of trial work'*).

S.Rep. No. 90-744 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2834, 3103 (emphasis added).

Perhaps the most compelling indication of Congress' intent to encourage disabled beneficiaries to attempt to work and not to penalize them for those efforts is the Employment Opportunities for Disabled Americans Act which, in 1986, made permanent the special disability benefits under the Supplemental Security Income ("SSI") program and eliminated all time limits on SSI disability beneficiaries' entitlement to work while still receiving benefits. Significantly, the special cash benefits program makes reduced SSI benefits payable to persons who work at or above the SGA level despite continuing severe medical impairment. 42 U.S.C. § 1382h; 20 CFR § 416.262. The legislative history of this program reflects Congress' strong desire to encourage disabled persons to attempt to work without the disincentive of termination of benefits.

> While the Congress has found it necessary and important to limit eligibility under these programs to those who are so medically disabled that they cannot work, the Committee recognizes that some individuals determined to meet the Social Security Act definition of disability are nevertheless so motivated towards work and independence that they later manage to work in spite of their impairments.
>
> Such individuals present a difficult dilemma for public policy. Allowing them to continue receiving income maintenance benefits would seem to undermine the fundamental Congressional decision that eligibility be limited to those who cannot work. This policy could lead to a far broader program which would not only be much more costly but would also raise serious policy issues.

> On the other hand, terminating benefits in such circumstances can be a powerful disincentive to the work efforts which these severely disabled individuals are otherwise motivated to attempt . . .
>
> . . . The Committee recognizes that section 1619 . . . will create some anomalous situations. The Committee believes however that the acceptance of some anomalies is a reasonable price to pay for a program which, without an expansion of the basic SSI program, removes substantial disincentives to work attempts by the most highly motivated disability recipients.

S.Rep. No. 99-466 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6087, 6088-90.[10]

It is clear from the legislative history that Congress has already weighed the competing concerns of possible expansion of the disability rolls versus encouraging disabled persons to try to work without the disincentive of immediate termination from the disability program, and that Congress has weighed in on the side of work incentives for disabled persons. This predisposition is demonstrated both in the SSI special cash benefits provisions and in the trial work statute under Title II, which makes a

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[10] Significantly, the committee concluded that the "overall economic impact on consumers and businesses would be negligible." *Id.* at 6097. In fact, the Congressional Budget Office estimated that there would actually be cost *savings* to SSI, concluding that "an estimated 20 to 30 percent of 1619 participants would reduce their work activity in the absence of the 1619 protections. Section 1619 thus encourages some disabled participants to increase their earnings, which in turn reduced SSI." *Id.* at 6099.

trial work period available from the very first month a person becomes entitled to disability benefits.

C. This Construction of the Statute is Supported by the Rulings of Four Other Courts of Appeals and Numerous District Courts.

The Fourth Circuit's construction of the statute and regulations is in accordance with the rulings of four other Courts of Appeals and many district courts. These courts, consistent with the language of the statute and long-standing regulations, have focused on the five-month waiting period and held that, because the statute and regulations entitle an applicant to benefits from the *first* month all criteria are met, including passage of the waiting period, the trial work period, which by definition begins in the month when the applicant is first entitled to benefits, must begin at that same time.

The leading case of *McDonald v. Bowen* held that an "individual who suffers from an impairment that is expected to last at least twelve consecutive months is entitled to benefits (as well as to a trial work period) after completing the five-month waiting period" even though the claimant had returned to work before the hearing and before 12 months had elapsed from the date of onset. 818 F.2d 559, 564 (7th Cir. 1986).

Likewise, the Tenth Circuit in *Walker v. Sec'y of Health & Human Services* concluded that an individual who suffers with an impairment which has lasted, or is expected to last, 12 months is entitled to disability benefits and to a trial work period after waiting five months. 943 F.2d at

1260. Similarly, the Eighth Circuit in *Newton v. Chater* rejected the rationale of SSR 82-52 and held:

> According to the statute and regulations, though, a trial work period starts in the month that entitlement to disability benefits begins, which is the month following five consecutive months of being under a disability that has lasted or is expected to last a total of twelve continuous months . . . In other words, under the statute, a claimant need not have had a disability for twelve consecutive months before he may test his ability to work.

92 F.3d at 694.

Most recently, the Sixth Circuit in *Salamalekis v. Comm'r of Soc. Security* ruled that, pursuant to the plain language of the Act, the claimant, who had established all five prerequisites of entitlement, was entitled to disability benefits and to a trial work period despite his return to work within 12 months of his onset date. 221 F.3d at 832, 834. The Court explicitly rejected the Commissioner's position that Salamalekis' return to work within 12 months of onset precluded a finding of disability:

> This position ignores the complete definition of disability under the Act, which covers not only those impairments that actually last 12 months, but also those impairments expected to last 12 months. At the time Salamalekis returned to work on March 2, 1992, his impairment was ongoing and was expected to last for 12 months, and the SSA so found. A claimant who meets Congress's prospective standard for disability cannot be denied benefits based on hindsight.

Id.

District courts have repeatedly adopted the rationale of the *McDonald, Walker, Newton* and *Salamalekis* courts, and their construction of the statute and regulations. *See, e.g., Mulderig v. Sullivan*, 1993 U.S. Dist. LEXIS 908 (S.D.N.Y. 1993); *Fabel v. Shalala*, 891 F.Supp. 202 (D.N.J. 1995); *Hunter v. Dept. of Health & Human Services*, 851 F.Supp. 75 (E.D.N.Y. 1994); *Wilson v. Shalala*, 841 F.Supp. 1491 (E.D. Wash. 1994); *Tepfer v. Sec'y of Health & Human Services*, 712 F.Supp. 156 (W.D. Ark. 1989); *Goldstein v. Harris*, 517 F.Supp. 1314 (S.D.N.Y. 1981); *Darring v. Callahan*, 1997 U.S. Dist. LEXIS 15187 (S. Ala. 1997); *Deihl v. Sec'y of Health and Human Services*, 835 F.Supp. 1182 (C.D.Cal. 1993); *Jenkins v. Heckler*, 783 F.Supp. 998 (D.S.C. 1992); *Hassan v. Apfel*, 2000 U.S. Dist. LEXIS 16953 (S.D.N.Y. 2000).

In all of these cases except *Walker* and *Newton*, the claimant had returned to work prior to final adjudication of his claim and within 12 months of his onset date. Each court analyzed the statute and regulations to hold that a claimant is "entitled" to disability benefits – and therefore to a trial work period – in the first month in which he meets all the criteria, including passage of the five month waiting period, such that the return to work was protected by a trial work period. Likewise, in this case, if, as the medical record clearly establishes, Walton had a disabling impairment which was expected to last at least 12 months, then he was entitled to disability benefits beginning in April 1995, once his five-month waiting period had elapsed. Consequently, his return to SGA in October 1995 must be considered as part of a trial work period and Social Security may not deny benefits to Walton on

the basis that he had, by that work, demonstrated an ability to engage in SGA. *McDonald*, 818 F.2d at 565.

D. Sound Policy Concerns Undergird the Rulings of the Fourth Circuit and Other Courts.

The sound policy concerns which underlie the rulings of the Fourth Circuit and other courts echo concerns raised by Congress throughout the legislative history. Key among those concerns was a desire to encourage disabled persons to try to work, despite continuing severe impairment, without the disincentive of losing benefits because of that work. As the *Hunter* court noted:

> Although SSR 82-52 no doubt serves to weed out the temporarily disabled, it also excludes the truly disabled who, like Ms. Hunter, after waiting indefinitely, are trying their level best to be productive. The agency's present posture in SSR 82-52 undermines such a claimant's initiative instead of encouraging it, as it ought to. The policy rewards apathy, as claimants come to realize that it is prudent to stay in bed probably until the anniversary of their disability, but certainly no sooner than the date upon which the agency stamps its approval on the disability claim. Congress could not have intended this result – deterring claimants who wish to return to work from doing so, especially if they do not do so because of the agency's inefficiencies.

Hunter, 851 F.Supp. at 79.

Like the Fourth Circuit, other courts have highlighted the inequity of making entitlement to benefits and a trial work period contingent upon the timing of the

agency's determination. *See*, e.g., *Tepfer*, 712 F.Supp. at 159 (noting that Social Security's interpretation would result in unequal treatment of applicants depending on the efficiency and workload of the Social Security office in which they filed); *Deihl*, 835 F.Supp. at 1189 n.5. (recognizing that economic necessity often forces claimants to return to work despite continuing impairment, forcing them "to choose between staying home without funds, thus, staying safely within the Secretary's regulatory scheme, or going to work because of economic necessity but running afoul of the Secretary's regulations").

The statutory construction endorsed by the Fourth Circuit and numerous other courts ensures that claimants are not penalized because they are forced to apply in an inefficient or overloaded Social Security office, and it promotes Congress' legitimate and clearly expressed goal of encouraging disabled persons to try to work without the disincentive of a disallowance because of the work attempt.

Cleveland Walton has been penalized by Social Security for his persistent effort to work despite his schizophrenia, and has been forced to endure six years of litigation in an effort to receive disability benefits. There is no question but that benefits would have been paid years ago had Mr. Walton merely stayed home and not attempted to work. Social Security's policy violates the unambiguous language of the disability definition and of the entitlement and trial work period statutes, and contravenes clearly expressed Congressional goals. The Commissioner's unlawful policy should be rejected so

that others like Cleveland Walton are not penalized in the future for their courageous, good-faith efforts to work.

CONCLUSION

The judgment of the Fourth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CLEVELAND B. WALTON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent does not dispute that the Commissioner has consistently construed the Social Security Act as providing disability benefits only to workers who have an impairment that has lasted or can be expected to last for the statutory time period at a level of severity that prevents substantial gainful activity. Immediately after the Act was amended in 1956 to provide disability insurance benefits, the Commissioner issued regulations specifying that a claimant is not entitled to benefits—that the then-applicable requirement of a "long-continued and indefinite duration" is not met—if "the impairment will, in the foreseeable future, be *so diminished as no longer to prevent substantial gainful activity.*" 22 Fed. Reg. 4362, 4363 (1957) (codified as 20 C.F.R. 404.1501(f) (1960 Supp.)) (emphasis added). As the Commissioner's contemporaneous instructions to the States explained, the "long-continued and indefinite duration" requirement refers to the "expected duration of the medical impairment" at a "level of severity sufficient to preclude SGA." OASI Disability Insurance Letter No. 39 (Pt. V of Disability Insurance State Manual), at 1 (Jan. 22, 1957).

When Congress changed the duration requirement to "not less than 12 months" in 1965, the Commissioner adhered to that construction, explaining that the requirement is not met unless the impairment "is expected to last at a disabling level for 12 months or more from onset." SSA Disability Insurance Letter No. III-6 (Pt. III of Disability Insurance State Manual), at 4 (Nov. 19, 1965); see Disability Insurance State Manual, § 316 (Sept. 9, 1965) ("Duration of impairment refers t. that period of time during which an individual is continuously unable to engage in substantial gainful activity because of [the] impairment."). See also SSR 73-7c, at 122 (Cum. Ed. 1971-1975) ("both the 'inability to engage in any substantial gainful activity' and the 'impairment' must exist

at the same time and for the required 12-month period"); 20 C.F.R. 404.1520(b), 404.1520(f) (2000) (claimant who engages in substantial gainful activity is "not disabled regardless of [his] medical condition"); Gov't Br. 24-27.

Congress also has long understood that the impairment must be of disabling severity for the full 12-month period. See Gov't Br. 20-21, 33-38. When Congress changed the duration requirement in 1965, the Senate Report explained that the amendment would provide "for the payment of disability benefits for an insured worker who has been or can be expected to be *totally disabled* throughout a continuous period *of 12 calendar months*." S. Rep. No. 404, 89th Cong., 1st Sess. Pt. I, at 98-99 (1965) (emphasis added). When Congress later provided supplemental security income (SSI) for the disabled poor, it again made clear that "[n]o benefit is payable * * * unless the *disability* is expected to last (or has lasted) at least 12 consecutive months." H.R. Rep. No. 231, 92d Cong., 1st Sess. 56 (1971) (emphasis added).

Respondent nevertheless insists (Br. 4) that the "clear and unambiguous" text of the Act requires the payment of benefits whenever the impairment—the mere physical or mental condition—has lasted or can be expected to last 12 months, even if it is not severe enough to prevent substantial gainful activity for much of that time. In his view, no "duration requirement for the inability to engage in substantial gainful activity * * * exists." Resp. Br. 6 (quoting Pet. App. 7a). The Commissioner, however, has reasonably read the twin definitions of disability in 42 U.S.C. 423(d)(1)(A) and (d)(2) to require not only an impairment, but an impairment so severe that it precludes the claimant from engaging in any substantial gainful activity. Those provisions nowhere suggest (much less unambiguously state) that the severity requirement is met so long as the impairment is of disabling severity for a mere moment. Respondent's position also cannot be reconciled with decades of appellate precedent,

and with the purpose of the disability program, which was to provide benefits for workers "forced into premature retirement" before age 65 "by reason of a *permanent and total* disability," not to provide compensation for workers suffering from short-term disabilities. H.R. Rep. No. 1189, 84th Cong., 1st Sess. 3 (1955) (emphasis added).

Respondent's construction, moreover, would fundamentally alter the nature of the Social Security program, eliminating a requirement the Commissioner has applied in resolving tens of millions of claims over 45 years. It would radically broaden the number of individuals entitled to benefits, creating an $8 billion annual burden. Pet. 18. And it would create a system that is exceedingly difficult to administer. Under respondent's approach, a claimant who is prevented from working for a short period by, for example, a virus or other chronic condition, would be entitled to SSI benefits under Title XVI if the condition, in a medical sense, persisted or is expected to persist in his body for a year. Thereafter, the Commissioner would have to find cause for and terminate benefits. Respondent nowhere explains why Congress would have sought to impose that burden on an agency that already processes over 2 million new claims a year. Further, although respondent relies on the policy of encouraging claimants to return to employment as soon as possible, his proposed construction would undermine that incentive by mandating the payment of benefits not merely to workers who return to their jobs, but also to workers who can return to work but do not do so.

I. THE AGENCY'S CONSTRUCTION IS CONSISTENT WITH THE ACT'S DEFINITION OF "DISABILITY"

A. The Text And History Of The Act Support The Commissioner's Construction

Respondent does not dispute that, if the Act is silent or ambiguous with respect to the precise question at issue here, the Commissioner's construction must be sustained so long

as it is reasonable. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 843 (1984); Gov't Br. 22-23. Rather, respondent argues that the text of the Act forecloses the Commissioner's interpretation. Respondent reasons (Br. 8) that, because the 12-month duration requirement in Section 423(d)(1)(A) unambiguously applies to the impairment, the statute necessarily *precludes* application of a corresponding 12-month duration requirement to the inability to engage in substantial gainful activity.

1. Respondent's textual argument begins (Br. 6-10) by ignoring critical features of the definition of "disability." Section 423(d)(1)(A) does require that the impairment last or be expected to last 12 months. But the text of Section 423(d)(1) does not unambiguously resolve the level of severity at which the impairment must persist during that time period. Consistent with the statutory goal of providing *disability* benefits rather than *impairment* benefits, the Commissioner has consistently interpreted the Act as requiring the impairment to persist at a disabling level of severity—that the impairment have been or be expected to be so severe as to preclude substantial gainful activity —throughout the 12-month qualifying period. See pp. 1-2, *supra*; Gov't Br. 20-21, 24-27 & n.7.[1]

That construction is supported by two features of the Act. The first is Section 423(d)(2)(A), which clarifies the definition

[1] That construction is embodied not merely in Social Security Rulings, but also in the Commissioner's recent notice-and-comment rulemaking, which explains that "the duration requirement to establish disability will not be met" if the "impairment no longer prevents substantial gainful activity" before the 12-month period has lapsed. 65 Fed. Reg. 42,772, 42,774 (2000); 60 Fed. Reg. 12,166, 12,168 (1995) (proposing construction). Contrary to respondent's contention (Br. 21, 27 n.6), deference is warranted even where the rulemaking is completed after the case has commenced. *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996); *United States* v. *Morton*, 467 U.S. 822, 835-836 n.21 (1984). The construction, furthermore, was applied in the adjudication of respondent's claim by the ALJ (Pet. App. 40a-41a) and the Appeals Council (Pet. App. 47a-48a).

of disability by specifying that a claimant is not disabled unless the impairment is "of such severity" that the claimant can neither "do his previous work" nor "engage in any other kind of substantial gainful work which exists in the national economy." That provision is naturally read as clarifying the scope of the severity requirement applicable to all relevant time periods—including the 12-month period during which the impairment must have lasted or be expected to last. Second, Section 423(d)(1)(A) itself expressly links the impairment and the inability to engage in substantial gainful activity. Under Section 423(d)(1)(A), it is not enough for a claimant to show an "impairment" of the specified duration. Instead, the claimant must suffer an "inability to engage in any substantial gainful activity *by reason of*" that impairment. Accordingly, it is reasonable for the Commissioner to construe Section 423(d)(1) as requiring that the claimant have an impairment that prevents (or is expected to prevent) substantial gainful activity for the requisite period. That is particularly true given the absurd consequences the contrary construction would yield. As we have noted (Gov't Br. 5, 40) and respondent does not dispute, Title XVI does not provide any "waiting period." Thus, under respondent's construction, a claimant who is prevented from working for a short period by, for example, hypertension, would be entitled to SSI benefits under Title XVI if that condition, in a medical sense, persisted for a year thereafter even if it did not affect his ability to work. There is no evidence that Congress contemplated such a result.

For similar reasons, respondent errs in asserting that the Commissioner's construction is precluded by the maxim that "a definition which declares what a term 'means' excludes any meaning that is not stated." Resp. Br. 12 (quoting *Colautti* v. *Franklin*, 439 U.S. 379, 392-393 n.10 (1979)). There is no need to refer to a "meaning" of disability other than the statutory definitions contained in Section 423(d)(1)(A) and

(d)(2)(A); nor is there any need to insert "additional language," Resp. Br. 8, or a "criterion" extraneous to those definitions, *id.* at 11-12. The severity requirement on which the Commissioner relies—the rule that the impairment must be so severe as to preclude substantial gainful activity—is set forth in Section 423(d)(1)(A) and (d)(2)(A). The only question is whether, consistent with the Commissioner's longstanding construction, the impairment must be of disabling severity throughout the 12-month period.

Deferring to the Commissioner's longstanding construction thus does no violence to the statutory text or Congress's intent. To the contrary, only the Commissioner's construction properly implements Congress's intent that benefits be paid only if the claimant is "totally disabled" for at least "12 calendar months." S. Rep. No. 404, *supra*, at 99; H.R. Rep. No. 231, *supra*, at 56.[2] Even respondent's amici agree with the Commissioner's construction: "There is no dispute," they explain, "that if the impairment is (or is expected to be) of *less than* disabling level severity for 12 months then the applicant cannot qualify for benefits." Br. AARP 13.[3]

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[2] Respondent errs in relying on the Commissioner's regulations to support his contrary construction. See Resp. Br. 20-21. The cited regulations do show that the *impairment* must have lasted or be expected to last at least 12 months. But, like the Act itself, they nowhere suggest that the impairment need not have lasted or be expected to last that long at the requisite level of severity, as the Commissioner has long required. Pp. 1-2, *supra*. The Commissioner's construction of her own regulations, of course, "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted). Similarly, respondent errs in claiming (Br. 8 n.2) that the "by reason of" language in Section 423(d)(1)(A) merely requires that the inability to work "result primarily from a medical impairment, not from economic conditions." It certainly has that effect. But it also requires a direct link between the underlying impairment and the resulting disability.

[3] Respondent now makes the case-specific argument that he has met the severity requirement because his impairment is "listed" as being "severe enough to prevent a person from doing any gainful activity." Resp. Br. 11 (quoting 20 C.F.R. 404.1525(a)) (emphasis omitted). That assertion is a red-herring. The Commissioner uses "listings" to simplify a *portion* of the severity determination; if an impairment is listed or is equivalent to a listed impairment, it is presumed to be sufficiently severe so long as other requirements (including durations) are met. See *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 804 (1999). Thus, if the claimant's impairment has ceased to prevent substantial gainful activity before the expiration of 12 months, the claim must be denied, whether or not the impairment is listed. See, *e.g.*, 20 C.F.R. 404.1520(b) (claimant engaged in "substantial gainful activity" will be found "not disabled" at first step, "*regardless of [his] medical condition*" (emphasis added)); S. Rep. No. 408, 96th Cong., 1st Sess. 45 (1979) (disability generally determined "not by medical severity, but rather * * * in terms of incapacity for significant employment—substantial gainful activity.").

2. Respondent asserts (Br. 13-14) that the courts "have determined that the statutory language is so clear that the agency's interpretation is not entitled to deference." That assertion is also incorrect.

As an initial matter, respondent erroneously conflates the two questions presented in this case. The cases on which respondent relies (Br. 13-14) generally do not address whether the impairment must have lasted or be expected to last *at a disabling level of severity* for the 12-month period to satisfy 42 U.S.C. 423(d)(1) and (d)(2), which is the first question presented. They address whether the *trial work* rules embodied in SSR 82-52 (and 20 C.F.R. 404.1592) are consistent with 42 U.S.C. 422(c), which is the second question presented. See pp. 15-20, *infra*. Relying on the "can be expected to last" component of the definition of disability, those cases hold that a claimant may be entitled to a trial work period if, at some point in the past, the disability *was* expected to last 12 months, even though that expectation later proved to be erroneous. See *McDonald* v. *Bowen*, 818 F.2d 559, 563 (7th Cir. 1986) (Resp. Br. 22); *Salamalekis* v. *Commissioner*, 221 F.3d 828, 822 (6th Cir. 2000) (Resp. Br. 14, 23). Although that reasoning is mistaken (pp. 16-17, 19-20, *infra*); neither *McDonald* nor *Salamalekis* casts doubt

on the Commissioner's rule that the impairment must have been (or be expected to be) of disabling severity *throughout* the 12-month period. To the contrary, *McDonald* holds that a claimant will receive benefits only if her "*disability* is still expected to last at least twelve continuous months" when she returns to work; "otherwise she will not receive benefits." 818 F.2d at 564 (emphasis added). Similarly, *Salamalekis* nowhere purports to overturn the Sixth Circuit's earlier decision in *Sierakowski* v. *Weinberger*, 504 F.2d 831 (1974) (per curiam), where the court held that the claimant's "[i]nability to engage in any gainful activity and the impairment which causes it cannot be separated," and that those "two components of disability must exist at the same time." *Id.* at 833 & n.1.[4]

In fact, the appellate decisions that do address the relationship between the 12-month duration requirement and the severity requirement fatally undermine respondent's position. The first appellate decision to address this issue, *Alexander* v. *Richardson*, 451 F.2d 1185, 1186 (10th Cir. 1971), cert. denied, 407 U.S. 911 (1972), specifically rejected respondent's construction, concluding instead that both

[4] The remaining decisions cited by respondent (Br. 13-14) similarly address the trial work period, not whether the impairment must be of disabling severity during the 12-month period. See, *e.g.*, *Fabel* v. *Shalala*, 891 F. Supp. 202, 206 (D.N.J. 1995) (Resp. Br. 14); *Jenkins* v. *Heckler*, 783 F. Supp. 998, 1000-1001 (D. S.C. 1992) (Resp. Br. 23). See also notes 5-6, *infra*. In *Singletary* v. *Bowen*, 798 F.2d 818 (5th Cir. 1986) (Resp. Br. 22), the court did distinguish between the impairment and severity requirements, but it ultimately concluded that the severity requirement had been met throughout the 12-month period because the claimant could not "obtain *and maintain* employment." *Id.* at 823. Here, in contrast, respondent successfully held a job for two years before being dismissed for selling alcohol to minors. Moreover, after *Singletary* was decided, the Fifth Circuit repeatedly reaffirmed the rule that "an impairment must be disabling for a twelve month period" and distinguished *Singletary* as creating an "exception" for mental illnesses that permit intermittent work but prevent claimants from retaining their jobs. *Johnson* v. *Bowen*, 864 F.2d 340, 346 (1988); *Neal* v. *Bowen*, 829 F.2d 528, 531 n.2 (1987).

"components of disability"—the impairment and the resulting inability to work—"must exist at the same time." The Sixth Circuit adopted that construction in *Sierakowski* in 1974, and the Eighth Circuit adopted it in *Titus* v. *Sullivan*, 4 F.3d 590, 594 (1993). Other courts have endorsed that construction as well. See *Estep* v. *Richardson*, 459 F.2d 1015, 1016 (4th Cir. 1972) ("claimant must have an impairment which prevents him from engaging in substantial gainful activity for a period of at least 12 months")[5]; *Johnson* v. *Bowen*, 864 F.2d 340, 346 (5th Cir. 1988) (per curiam) (the "impairment must be disabling for a twelve month period"); *McDonald*, 818 F.2d at 564. The decision in this case thus represents a sharp departure from the longstanding judicial interpretation of the Act, as well as from the Commissioner's longstanding interpretation.[6]

3. To the extent there can be doubt concerning the reasonableness of the Commissioner's construction, Congress's repeated amendments to the Act eliminate it. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence

[5] Although respondent attempts to distinguish *Estep* as a case in which the *impairment* did not last a year, that misreads *Estep*. There, the court of appeals upheld the denial of benefits because the claimant could "*work* as early as March 3, 1969," 459 F.2d at 1016 (emphasis added), *i.e.*, because the impairment had ceased to be *disabling* before the end of 12 months. Indeed, the impairment itself persisted for more than 12 months; "residuals" of the injury continued to give the claimant "trouble" and made it difficult to bend or stoop years later. *Ibid.*

[6] Respondent errs in asserting (Br. 24-25) that *Walker* v. *Secretary of HHS*, 943 F.2d 1257, 1260 (10th Cir 1991), and *Newton* v. *Chater*, 92 F.3d 688 (8th Cir. 1996), "effectively" overruled *Alexander* and *Titus*. *Walker* and *Newton* addressed the Commissioner's trial work regulations, not whether the impairment must have been or be expected to be of disabling severity for the requisite duration. See Gov't Reply Br. Cert. Stage at 2-3.

that the interpretation is the one intended by Congress.'" *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986).

Respondent does not dispute that Congress made repeated amendments "over the years without changing the Commissioner's construction." Resp. Br. 17-18 n.4. Nor does respondent deny that Congress, while amending the Act, reaffirmed that construction. See p. 2, *supra*; Gov't Br. 33-38. Thus, respondent ignores the fact that Congress, while changing the duration requirement from "long-continued and indefinite" to "not less than 12 calendar months" in 1965, acknowledged that prior law had precluded the payment of benefits unless "the worker's *disability*"—*i.e.*, his inability to engage in substantial gainful activity by reason of the impairment—"is expected * * * to be of long-continued and indefinite duration." H.R. Rep. No. 213, 89th Cong., 1st Sess. 88 (1965) (emphasis added). Respondent ignores the Senate Report's explanation that the Act, as amended, would make an insured worker "eligible for disability benefits if he has been *under a disability* which * * * has lasted or can be expected to last for a continuous period of *not less than 12 calendar months*." S. Rep. No. 404, *supra*, at 13 (emphasis added). See also *id.* at 98-99 (quoted p. 2, *supra*). And he ignores the reason Congress chose to impose a 12-month duration requirement—because "in the great majority of cases in which *total disability* continues for at least a year the *disability* is essentially permanent." *Id.* at 99 (emphasis added). Respondent also makes no attempt to address the similar statements in the House and Senate Reports accompanying the 1967 and 1972 amendments. See p. 2, *supra*; Gov't Br. 37-38.

Respondent nonetheless asserts (Br. 18 n.4) that the Commissioner's construction was not well settled when Congress amended the Act, because it was "at odds with judicial interpretations." Respondent is mistaken. Respondent cites (and we have found) no case preceding or contemporaneous to the 1965 and 1967 amendments disagreeing with the Commissioner's construction. Moreover, when Congress amended the statute in 1972, two courts of appeals —the 10th Circuit in *Alexander* and the Fourth Circuit in *Estep*—had concluded that both the impairment and the resulting inability to work must have lasted or be expected to last the 12-month period. See pp. 8-9, & nn. 4-6, *supra*.

In fact, respondent cites nothing from the legislative history of the 1965, 1967, or 1972 amendments that contradicts the Commissioner's construction.[7] Nor does respondent cite anything from the history of the 1956 amendments that created the disability insurance benefit program. Instead, respondent relies (Br. 15-16) on the legislative history of certain *1954* amendments. Those amendments, however, created a *different* program—the "disability freeze" program (see 42 U.S.C. 416(f))—two years before Congress created the disability insurance benefit program at issue here. See Gov't Br. 33-34. Even that legislative history for the most part supports the Commissioner's construction. *Ibid.* Moreover, as we pointed out (and respondent does not dispute), the second of the statements quoted by respondent was largely without significance even for the disability freeze program to which it referred. Gov't Br. 35 n.11. And the first of the statements he quotes (Resp. Br. 16) referred to a distinctive feature of the disability freeze provision that was not present in the disability

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[7] Respondent identifies portions of the legislative history indicating that the *impairment* must have lasted or be expected to last 12 months. See Resp. Br. 17. But that proves nothing. No one disputes that the impairment must be of the specified duration. The only question is whether the impairment must have lasted or be expected to last that long at a *disabling level of severity*. As the House and Senate Reports demonstrate, Congress clearly understood that the answer to that question is "yes"—that the worker must be "totally disabled throughout a continuous period of 12 calendar months" because of the impairment. See S. Rep. No. 404, *supra*, at 99.

insurance program enacted two years later.[8] In any event, the statements quoted by respondent furnish no basis for adopting respondent's vision of the disability insurance program 45 years after it was established. That is particularly so because Congress understood, when it created the disability insurance benefits program in 1956, that a worker would receive benefits only if his "disability"—defined as the inability to work on account of an impairment—was of "long-continued and indefinite" duration (H.R. Rep. No. 1189, *supra*, at 5), and it since has repeatedly expressed that understanding, pp. 1-2, 10, *supra*.

B. Respondent's Construction Would Convert The Act Into A Short-Term Disability Program and Undermine Work Incentives

1. Respondent's claim that he is entitled to benefits merely because his underlying medical condition lasted at least a year—even though it did not preclude him from successfully returning to work during that period—is also impossible to reconcile with the purpose of the disability programs. Congress established these programs to protect workers who were "forced into premature retirement" before age 65 "by reason of a permanent and total disability," not to provide payments to workers who are only briefly prevented from working by a long-term medical condition. H.R. Rep. No. 1189, *supra*, at 3. Congress, moreover, rejected proposals in 1965 to provide benefits to individuals who were disabled for just six months, finding it "necessary

[8] The disability freeze program specified that the "term 'period of disability' means a continuous period of not less than six full calender months * * * during which an individual was under a disability * * *." Social Security Amendments of 1954, ch. 1206, § 106(d), 68 Stat. 1080; see 42 U.S.C. 416(i)(2)(A) (now providing that "period of disability" must be "at least 5 months"). A "period of disability" ended under the 1954 program not only when the disability ceased, but also when the individual reached retirement age. 1954 Amendments, § 106(d) (adding 42 U.S.C. 416(i)(2)); accord 42 U.S.C. 416(i)(2)(D) (1994).

to require that a worker be *under a disability* for a somewhat longer period than 6 months in order to qualify for disability benefits." S. Rep. No. 404, *supra*, at 98 (emphasis added). Respondent's construction of the Act would contravene that deliberate choice. Under it, claimants would receive Title II insurance benefits if they are unable to work for only five months (the duration of the waiting period provided by 42 U.S.C. 423(c)(2)(A)). Moreover, because Title XVI does not have a waiting period, the Commissioner would be required to process claims for and pay Title XVI SSI disability benefits to claimants who have chronic impairments and suffer an inability to engage in substantial gainful activity of virtually *any* duration. Recognizing as much, respondent all but abandons his former suggestion (Br. in Opp. 11, 17-18) that the five-month waiting period establishes a *de facto* duration requirement for the inability to work. Gov't Br. 40-42.

Nonetheless, respondent argues (Br. 26) that his construction would generally prevent the payment of benefits for short-term disabilities because, he asserts, some impairments of long-term duration will "never [be] so severe as to prevent" substantial gainful activity, while other impairments that are sufficiently severe at the outset will not last the full 12-month period. Those contentions ignore the huge number of impairments—medically determinable defects in the normal functioning of the body such as carpal tunnel syndrome, back injuries, viral infections, and even the hypertension respondent mentions—that often last indefinitely but generally prevent workers from engaging in substantial gainful activity, if at all, only briefly or intermittently. See Gov't Br. 28-29. Under respondent's construction, each of those common ailments would become a compensable disability under Title XVI if it prevents the claimant from working for virtually any period of time, however brief, and under Title II if it prevents work for just

five months—whether or not the claimant later goes back to work. Thus, far from barring the payment of benefits for short-term disabilities, respondent's construction would mandate that result in a vast number of cases. Respondent points to no indication that Congress intended to impose either the resulting $8 billion per-year cost of paying those claims, or the enormous administrative burden of processing them, on an agency that already processes two million claims a year. See Pet. 18-19.

2. Ultimately, respondent's fundamental contention—and the theme underlying his submission—is that Section 423(d) should be read to link the duration requirement to the impairment, but not to the inability to work, to give claimants an incentive to return to work notwithstanding their impairments. That argument, however, once again conflates the two questions presented. Congress addressed the incentive for disabled individuals to return to work through the trial work provisions of Title II (42 U.S.C. 422), and the work incentive program in Title XVI (42 U.S.C. 1382h), as well as the recently established Ticket to Work and Self Sufficiency Program (42 U.S.C. 425(e), 1320b-19, 1383(a)(6) (Supp. IV 1999). See also p. 19, *infra* (regulations relating to unsuccessful work attempts). Moreover, under the Commissioner's construction, a claimant who has not yet been adjudicated disabled *already* has a strong incentive to return to work, because there is no guarantee that the Commissioner will award him benefits, especially if he becomes able to work before benefits are awarded.

Finally, contrary to respondent's repeated suggestion, his construction would not merely establish a narrow exception to the 12-month duration requirement that is limited to those claimants who actually return to work despite an impairment. Rather, it would require the payment of benefits to millions of claimants who, having suffered a short-term disability by reason of a chronic impairment, can but do not

return to work within 12 months of the disability's onset. And it would be the Commissioner's burden to *continue* paying benefits or to find justification and initiate proceedings to terminate them. See, *e.g.*, 42 U.S.C. 423(f)(1) (termination of benefits permitted if "the individual is now able to engage in substantial gainful activity" because "there has been any medical improvement in the individual's impairment"). Respondent thus envisions a program that would be virtually impossible to administer—a program that creates an enormous number of entitlements for short-term disabilities and then places the burden of terminating payments on an agency that already processes two million claims a year. For similar reasons, respondent's construction in fact would create an enormous *disincentive* to working. Under it, millions of additional individuals would become eligible for benefits even though they are disabled only briefly; they would receive benefits for a period of time during which they could work; and they would continue to receive those benefits until the Commissioner managed to terminate them.

II. RESPONDENT IS NOT ENTITLED TO A TRIAL WORK PERIOD BECAUSE HE NEVER BECAME ENTITLED TO BENEFITS

Alternatively, respondent argues that neither his ability to work nor his actual return to work within 12 months of the onset of his alleged disability should preclude him from receiving benefits because, he claims, he was entitled to a nine-month trial work period under 42 U.S.C. 422(c). As respondent concedes, the trial work period begins "with the month in which [the claimant] *becomes entitled* to disability insurance benefits." Resp. Br. 27 (emphasis added) (quoting 42 U.S.C. 422(c)(3)). Respondent, however, never became entitled to benefits. And where the claimant never

"becomes entitled" to benefits, under the plain text of Section 422(c)(3), the trial work never "begin[s]."[9]

A. Respondent essentially ignores that construction of the Act, which was explained in detail in the Commissioner's recent rulemaking and resulting regulations (20 C.F.R. 404.1592(d)(2); 65 Fed. Reg. at 42,774, 42,780), and in our opening brief (at 44-46, 47-48). Instead, respondent asserts that an individual is entitled to benefits, and a trial work period, if his impairment "was still expected to last" 12 months as of "the date of application." Resp. Br. 31, 32. Thus, respondent asserts, he became "entitled" to benefits, and to a trial work period, after five months of disability because, when he applied for benefits, his impairment "*was* * * * expected" to be disabling for at least 12 months. That is true, he claims, even though the disability had not lasted and could not be expected to last 12 months when his claim was actually adjudicated. *Id.* at 32.

That contention is contradicted by the Act's text. See Gov't Br. 45 n.14. Section 423(d)(1)(A) does not provide that an applicant is entitled to benefits if his disabling impairment *was* expected to last 12 months at some point in the past. Instead, an applicant is entitled to benefits if the impairment precluding substantial gainful activity "*has* lasted or *can be* expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A) (emphasis added). Because Section 423(d)(1)(A) uses the present tense in describing expected duration—"*can be* expected to last"—it is "most reasonably * * * interpreted to mean that the time of *adjudication* is the relevant point of reference." 65 Fed.

[9] If respondent had been found entitled to benefits, the Commissioner would have calculated the beginning date for his entitlement; the trial work period would then be deemed to have begun in the first month of work activity following that date. Because the Commissioner concluded that respondent was not entitled to benefits, however, there was no "first month" of entitlement. See 65 Fed. Reg. at 42,781.

Reg. at 42,780 (emphasis added). Consequently, if the claimant's disability has not already lasted and cannot be expected to last for 12 months when the adjudication takes place, the claimant is not entitled to benefits and is not entitled to a trial work period. "If Congress had intended benefits" and a trial work period "to be awarded based on evidence that a claimant's impairment(s) did not in fact prevent substantial gainful activity for 12 continuous months, but only had been expected to do so at some earlier point in the 12-month period, we believe that Congress would have provided for a finding of disability based on an impairment(s) which *was* expected to last 12 months, in addition to one which *can be* expected to last 12 months." *Ibid.*

Respondent asserts (Br. 31-32) that the Commissioner's construction eliminates the "can be expected to last" language from the Act, or "reads into it a 12-month waiting period" in place of the five-month waiting period established by Congress. Neither assertion is correct. Where the claim for benefits is adjudicated within 12 months of filing—as is often the case—the claimant will be entitled to benefits even if his disabling impairment has not already lasted 12 months, *if* the decisionmaker finds that it "can be expected to last" that long. The Commissioner's construction thus gives full effect to the present-tense meaning of the phrase "can be expected to last." Nor does the Commissioner's construction replace the five-month waiting period under Title II with a 12-month waiting period. Disability benefit claims under Title II can be processed within five months of the alleged disability's onset, and such claims can be (and often are) paid after the fifth month following the onset date *if* the adjudicator determines that inability to work can be expected to last at least 12 months. Gov't Br. 41-42.

B. Respondent also argues that the Commissioner's construction is "unfair" and "arbitrary" because, in some cases, the entitlement to benefits might depend on when the claim

is adjudicated. Resp. Br. 32-33, 40-41. As the Commissioner pointed out, however, that is an inevitable consequence of permitting the Commissioner "to adjudicate disability claims and award benefits without having to wait 12 months from onset," because the Commissioner necessarily must rely on potentially faulty predictions about the disabling impairment's duration. See 65 Fed. Reg. at 42,780. Some claimants may be awarded benefits (and trial work periods) because the Commissioner makes a reasonable but mistaken projection that the disabling impairment will last 12 months. But that hardly compels the conclusion that the Commissioner must award benefits to claimants whenever, if she had adjudicated their claims earlier, she would have made such a mistake. In other legal contexts, evidence that develops after the claim is filed, but before adjudication, is routinely considered admissible and probative. That is true even if that evidence would not have been available—and the outcome therefore might have been different—had the adjudication occurred earlier. See Gov't Br. 49-50.

C. Respondent's reliance on policy and the Act's legislative history (Br. 33-37) is also unavailing. The materials cited by respondent do show that Congress, by establishing trial work periods, sought to encourage disabled beneficiaries who are entitled to benefits to return to work notwithstanding their receipt of benefits. But those materials do not suggest that a claimant becomes entitled to benefits and a trial work period if, at the time his claim is adjudicated, his impairment no longer prevents substantial gainful activity and never did so for 12 continuous months, merely because it might reasonably (but erroneously) have been predicted to last 12 months in the past. The Senate Report accompanying the 1965 amendments in fact contradicts respondent's suggestion. Gov't Br. 46-47.

More fundamentally, respondent's proposed construction does not create—and in fact undermines—the incentive to

return to work on which he relies. Under respondent's view, the fact that the claimant's inability to engage in substantial gainful activity was reasonably but mistakenly expected to last 12 months at the time of application is sufficient to require an award of benefits. That is true not only for the claimant who returns to work within 12 months, but also for the claimant who becomes able to work but chooses not to; the past expectation of a 12-month duration, when the claim was filed, would be sufficient to create entitlement. Respondent's construction thus would award benefits to individuals who are able to work but choose not to do so.

Nor is respondent correct in asserting that the Commissioner's rules deter insured workers from attempting to return to work. Under the Commissioner's rules, any attempt to return to work that is unsuccessful—such as an attempt that lasts less than 3 months—will not preclude the applicant from receiving benefits. See 65 Fed. Reg. at 42,780; 20 C.F.R. 404.1574(c), 404.1575(d) (2001); Gov't Br. 27 n.8. Those regulations offer significant protection for genuinely disabled individuals who make an effort to overcome their circumstances within 12 months of the alleged disability's onset. The regulations do not afford benefits to claimants who can successfully return to work within 12 months of the alleged disability's onset (whether they actually return to work or not). But such claimants are not precluded from working by their impairments—they are not disabled—and have not suffered the sort of long-term disability Congress required. They therefore have no reason to demand disability benefits on top of the earnings they could or do derive from their substantial gainful activity.

D. Finally, respondent notes (Br. 37-40) that a number of courts have rejected the Commissioner's construction of the trial work rules. The decisions respondent cites, however, commit the same error as respondent and the decision below. Ignoring Congress's use of the present tense—"can be

expected to last"—in Section 423(d)(1)(A), those courts have read the Act as entitling a claimant to benefits and a trial work period if the impairment *was* expected to last 12 months when the claimant returned (or became able to return) to work. See *e.g.*, *Salamalekis*, 221 F.3d at 832; *McDonald*, 818 F.2d at 564. Like respondent, however, none of those decisions attempted to reconcile that construction with the Act's text, which requires a disability that *can* be expected to last the requisite period, not one that reasonably *was* expected to last that long at some point in the past.

Moreover, just as respondent does not explain why expected duration should be determined as of the date of the *application*, those decisions fail to explain why expected duration should be determined as of the date of the claimant's *return to work*. The reason for those omissions is clear: The Act, most naturally read, requires the expected duration of the disability to be determined in view of the evidence available when the claim is adjudicated, not at some (unspecified) point in the past. But even if the statute were "ambiguous" or "silent on the matter of time," the Commissioner's reasonable construction must be sustained. *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 458 (1998). Nothing in the statute or its history requires the Commissioner to make determinations regarding expected duration based on what might have been *thought* to be true at some point in the past and to ignore evidence showing that the claimant already returned to work or could do so.

* * * * *

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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No. 00-1937

IN THE
SUPREME COURT OF THE UNITED STATES

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY,

Petitioner,

v.

CLEVELAND B. WALTON,

Respondent.

On Writ of Certiorari To The
United States Court of Appeals
For the Fourth Circuit

BRIEF *AMICI CURIAE* OF AARP; NOSSCR; ET AL.; IN SUPPORT OF RESPONDENT

(Additional *Amici* continued on inside cover)

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The Arc of the United States;
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Helen Keller National Center for Deaf-Blind Youths and Adults (HKNC);
National Association of Developmental Disabilities Councils (NADDC);
National Multiple Sclerosis Society;
Title II Community AIDS National Network (TIICANN),
United Cerebral Palsy Associations

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BRIEF *AMICI CURIAE* OF AARP; NOSSCR; ET AL.; IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*[1/]

This *amici curiae* brief is submitted on behalf of AARP, the National Organization of Social Security Claimants' Representatives (NOSSCR), the National Senior Citizens Law Center (NSCLC), the American Association of People with Disabilities, the American Council of the Blind (ACB), the

[1/] This brief has been authored in its entirety by undersigned counsel for the *amici*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation or submission of this brief.

American Occupational Therapy Association, The Arc of the United States, the Bazelon Center for Mental Health Law, the Brain Injury Association of America, the Disability Law Center (Boston, Massachusetts), the Epilepsy Foundation®, the Helen Keller National Center for Deaf-Blind Youths and Adults (HKNC), the National Association of Developmental Disabilities Councils (NADDC), the National Multiple Sclerosis Society, the Title II Community AIDS National Network (TIICANN) and the United Cerebral Palsy Associations. The statement of interest of *amici* is included in the appendix to this brief.

By written consent of the parties, *amici curiae* submit this brief in support of the Respondent.[2/]

SUMMARY OF THE ARGUMENT

Federal disability benefit programs provide a low level of income support for individuals whose severe disabilities have lasted or are expected to last twelve months. The programs include numerous deterrents to leaving work to claim benefits. While most people with disabilities want to work, many are unable to secure employment, due to both the severity of their disabilities and workplace discrimination.

Many applicants for federal disability programs do not receive a final favorable decision for over a year. While waiting for benefits, many applicants have no means of support and live in abject poverty. Due to their dire need for income, applicants may try unsuccessfully to return to work. People with disabling impairments should not be denied disability benefits for attempting to work when they have waited months for a decision on their applications for benefits and have no other means of survival.

The Commissioner's interpretation of the Social Security Act in this case punishes the person with an impairment of

---

[2/] Letters of consent from both parties have been filed separately with the Clerk of the Court.

disabling severity which persists for at least twelve months, who attempts to return to work. The Commissioner's position is not only inconsistent with the plain meaning of the Act but also is contrary to the unanimous view of all five circuit courts of appeal which have considered the issue.

Individuals with disabilities who attempt to return to work are often unsuccessful in maintaining that employment. The Commissioner's interpretation of the Social Security Act would result in the denial of benefits if the application is decided during a brief period of an unsuccessful work attempt which started within 12 months, but would result in the approval of benefits if the application is decided by the agency after a brief work attempt has failed. This unreasonable and capricious result can be easily avoided by following the literal statutory definition of disability which does not require the applicant to cease working for twelve months.

The Commissioner's position in the instant case is also inconsistent with the rehabilitative goal of the Social Security Act and related legislation to provide incentives for individuals with disabilities to work. For example, the Ticket to Work legislation is replete with Congressional statements emphasizing the importance of encouraging people with disabilities to work and not penalizing them for their efforts to secure gainful employment.

ARGUMENT

I. DISABILITY BENEFITS BARELY LIFT MOST BENEFICIARIES OUT OF POVERTY AND ARE NOT A DISINCENTIVE TO WORK

The federal disability benefit programs provide a low level of income support for individuals with severe disabilities. These programs do not encourage people to leave work, but rather provide a minimal safety net of support for individuals whose disabilities impose limitations on their earnings capacity.

The Social Security Disability Insurance ("SSDI") benefit calculation is designed to provide a higher percentage of

earnings replacement for low earners than for higher earners. For example, a worker who had been earning $30,000 per year would receive SSDI benefits at approximately 43% of her earnings, while a worker who had been earning $76,000 per year would have an SSDI replacement rate of 28%. Despite the fact that at lower earnings levels benefits can amount to approximately half of prior earnings, this nevertheless often results in a standard of living below poverty.[3] The average monthly SSDI benefit in December 2000 was $786, just slightly higher than the poverty threshold of $747 per month for an individual.[4]

The program contains numerous deterrents to leaving work to claim benefits. SSDI covers only those workers with a record of fairly steady and recent work. The program imposes a five-month waiting period, during which no benefits may be received, regardless of the severity of the disability.[5] In addition to the five-month waiting period for benefits, there is a 24 month waiting period to obtain health care coverage

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[3] National Academy of Social Insurance (NASI), *Disability Income Policy in 2001 - Excerpts from Balancing Security and Opportunity*: The Challenge of Disability Income 45 (2001) http://www.nasi.org/publications2763/Publications_list.htm?cat=Reports.

[4] *Id.* Of course, without Social Security benefits, individuals with disabilities would be much poorer. *See* Social Security Administration, *Income of Disabled-Worker Beneficiaries* 22 (2001), http://www.ssa.gov/policy/programs/disability/di_chart.pdf. While this brief specifically addresses the SSDI program, the issues in this case could have an impact on other disabled beneficiaries who receive benefits under Tittle II of the Social Security Act, such as disabled adult children, *see* 42 U.S.C. § 402(d)(1) (2001), and disabled surviving spouses, *see* 42 U.S.C. § 402(e)(1) and (f)(1) (2001). These programs use a definition of disability similar to the SSDI program.

[5] 42 U.S.C. § 423(a)(1), (c)(2) (2001).

through Medicare. These waiting periods "provide incentives for persons to remain at work, if possible."[6]

The two most prevalent diagnoses leading to an award of SSDI benefits in 1999 were impairments of the musculoskeletal system (24%) and mental impairments (23%). Other major diagnoses that led to an award of SSDI benefits in 1999 were impairments of the circulatory system (12%) and neoplastic disorders (cancer) (11%).[7]

The Supplemental Security Income program ("SSI") also provides benefits to persons with disabilities. SSI is not based on the individual's work record, but instead is a means tested program, provided for those with no or low income and assets. In 2002, the maximum federal SSI benefit level will be $545, which is only about 70 percent of the official poverty threshold for an individual under age 65. In most states, SSI recipients are automatically entitled to health care coverage under the Medicaid program. Nevertheless, with benefit levels below the poverty line, most individuals would prefer reasonably remunerative employment.[8]

The number of individuals newly awarded disability benefits through the SSDI and SSI programs has been fairly steady since the end of the recession in the early 1990s. Death and shifting to retirement benefits at age 65 are the main reasons people stop receiving disability benefits. The proportion of recipients

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[6] NASI, *supra*. The 24 month waiting period for Medicare benefits does not apply to individuals with end stage renal disease or amyotrophic lateral sclerosis. 42 U.S.C. § 426-1(b) (2001); Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 115, 114 Stat. 2763 (2001).

[7] Social Security Advisory Board, *Disability Decision Making: Data and Materials* 43 (2001), http://www.ssab.gov/reports.html.

[8] NASI, *supra*, at 46.

who medically recover or return to work has always been relatively small.[9/]

II. MOST PEOPLE WITH DISABILITIES WANT TO WORK BUT HAVE GREAT DIFFICULTY FINDING JOBS

Most Americans with disabilities want to work but are not able to secure employment, *see* H. R. Rep. No. 106-220, at 5 (1999), due to both the severity of their disabilities and barriers to employment. A Harris Poll conducted in 2000 found that only 32% of people with disabilities of working age (18 to 64) worked full or part-time, compared to 81% of people without disabilities. The more severe the disability and the older the individual, the less likely that person is to be employed. The unemployment rate for people with disabilities has remained relatively constant over the past fourteen years. Among those not working, two out of three people with disabilities stated that they would prefer to work.[10/]

While people with disabilities who are able to work are better off financially than those who do not work at all, people with disabilities who are employed earn far less than the non-disabled population. Estimates of earnings of workers with disabilities indicate that they earn about forty percent less than those without disabilities. Even those persons with disabilities who work full time have a poverty rate three times that of full

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[9/] NASI, *supra*, at 35-38.

[10/] National Organization on Disability, *Employment Facts about People with Disabilities in the United States*, http://www.nod.org/cont/dsp_cont_item_view.cfm?viewType=search&contentId=14 (June 28, 2001) (citing National Organization on Disability and Louis Harris and Associates, 2000 *N.O.D./Harris Survey of Americans with Disabilities* (2000) (hereinafter N.O.D./Harris poll).

time workers without disabilities.[11/] Moreover, people with disabilities tend to have less education than persons without disabilities, further compounding their difficulty in securing employment.[12/]

Individuals with disabilities encounter "widespread discrimination" from employers who tend to underestimate their productivity and "overstate the limiting effects of impairments."[13/] More than one third of employed people with disabilities (36%) surveyed by the Harris Poll in 2000 reported that they had encountered discrimination in the workplace because of their disabilities, such as being refused a job due to their disabilities, being given less responsibility than co-workers, being paid less than other workers with similar skills in similar jobs, and being refused a job promotion.[14/]

The Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, passed in 1990, prohibits discrimination by employers against persons with disabilities, and requires employers to provide reasonable accommodations for employees with disabilities.[15/] While the ADA is helpful to some persons with disabilities, the ADA has neither eliminated

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[11/] *Id.*; Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. Ill. L. Rev. 889, 898, 911 (2000).

[12/] Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 Tex. L. Rev. 1003, 1012 (1998); Edward Yelin & Miriam Cisternas, *The Contemporary Labor Market and the Employment Prospects of Persons with Disabilities at 50* in Jerry L. Mashaw et al. eds., *Disability, Work and Cash Benefits* (1996).

[13/] Diller, *supra*, at 1012.

[14/] N.O.D./Harris poll, *supra*.

[15/] The employment discrimination provisions in Title I of the ADA are applicable to employers with 15 or more employees. 42 U.S.C. § 12111(5)(A) (2001).

discrimination nor obviated the "[s]evere levels of unemployment and poverty" that persons with disabilities experience.[16/]

Due to the difficulty persons with disabilities experience in securing employment, most people whose claims for disability benefits are denied remain out of the work force. Furthermore, studies of individuals who were terminated from disability benefits in the early 1980s and did not get reinstated found that many such persons remained out of work years later.[17/] These studies demonstrate "the magnitude of the barriers to work faced by" persons with disabilities.[18/]

In the instant case, the Commissioner argues that even though the Social Security Act does not require the applicant to be out of work for 12 months in order to qualify for benefits, the agency has chosen to deny benefits to applicants with severe disabilities who attempt to go back to work less than a year from their date of application but prior to a determination of disability. (Petitioner's Brief at 30-32.) With all the disincentives that exist for people with disabilities to attempt to work, there is no justification for the Commissioner to add another disincentive as she attempts to do here, which she acknowledges is not required by the text of the Act.

III. DESTITUTE APPLICANTS WITH DISABLING IMPAIRMENTS MAY TRY TO RETURN TO WORK IN ORDER TO SURVIVE BECAUSE OF LENGTHY DELAYS IN AWARDING BENEFITS

Many applicants wait numerous months, or even years, for a favorable decision on their applications for disability benefits. Lacking any means of support, some disabled applicants attempt to reenter the workforce in order to pay their bills and

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16/ Weber, *supra*, at 890-891.

17/ Diller, *supra*, at 1071.

18/ *Id.*

survive. However, due to their disabilities, many applicants who try to work are unsuccessful and become destitute as a result.

Claimants seeking either SSDI or SSI may proceed through a four step administrative process to obtain a final decision on their disability applications. Claims are considered first on an initial application. A claimant denied benefits may seek reconsideration. If denied again, a claimant may request a *de novo* hearing before an SSA administrative law judge (ALJ). If denied again, a claimant may request review of the hearing decision by SSA's Appeals Council as a prerequisite for seeking judicial review in federal district court. Additionally, the Appeals Council may perform "own motion" review of an ALJ decision which is favorable to a claimant. A claimant receiving a final administrative decision denying benefits may seek judicial review in the federal district court.[19/]

In FY 2000, an average wait for an ALJ decision on an SSDI claim was approximately 437 days from the initial date of application, or over one year and two months.[20/] In that year,

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19/ *See generally Sims v. Apfel*, 520 U.S. 103, 105 (2000); *Bowen v. City of New York*, 476 U.S. 467, 472 (1986); 42 U.S.C. § 405(g) (2001). The Social Security Administration is experimenting in some states with eliminating the reconsideration stage and also eliminating for some claimants the request for review to the Appeals Council. Modifications to the Disability Determination Procedures; Disability Claims Process Redesign Prototype, 64 Fed. Reg. 47218 (Aug. 30, 1999), 65 Fed. Reg. 36210 (June 7, 2000).

20/ In FY 2000, the average processing time from the date of application to the date of an initial decision on SSDI benefits was 104 days and for SSI benefits was 120 days. The average processing time for reconsideration of an unfavorable decision for SSDI was approximately 63 days. (The time for reconsideration of an SSI claim was not reported.) The average processing time for an ALJ hearing in FY 2000 was 274 days from the date of a hearing request, down from its peak of 386 days in 1997. Social Security Advisory Board, *Charting the Future of Social Security's*

(continued...)

approximately 255,000 individuals were awarded benefits at the ALJ level. If a claim is appealed to the Appeals Council, the wait for a final administrative decision stretches well beyond another year, though only a small number of people (under 2,500 in FY 2000) are awarded benefits by the Appeals Council.[21/]

While awaiting a decision, many applicants are destitute and live in abject poverty. The Court has recognized that Social Security disability benefits and SSI provide "the very necessities of life," and that the wrongful denial of these benefits imposes "trauma" which is "beyond what anyone of normal sensibilities would wish to see imposed on innocent disabled citizens." *Schweiker v. Chilicky*, 487 U.S. 412, 428-29 (1988). The Court has stated that the harm from wrongful denials of Social Security disability benefits can be "irreparable." *Bowen v. City of New York*, 476 U.S. 467, 483-484 (1986).

In the past, state general assistance programs often provided income support for individuals with chronic illnesses who did not receive federal disability benefits. Recently, many states have either abolished general welfare programs for adults unable to work or placed severe restrictions on how long a person may receive aid.[22/] Even in states that have maintained general assistance, the amounts of benefits are quite low.

Applicants with disabling impairments necessarily are uncertain about whether they will receive benefits. Although

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[20/](...continued)
Disability Programs: The Need for Fundamental Change 7 (2001), http://www.ssab.gov/reports.html; *Disability Decision Making, supra*, at 80-81, 86.

[21/] In FY 2000, the average processing time for an Appeals Council decision was 505 days from the request for review. *Id.* In some cases, benefits are not received promptly after a favorable decision is issued.

[22/] Weber, *supra*, at 939.

66% of people who appeal to the ALJ level are awarded benefits at that stage,[23/] individuals cannot know whether they will be successful in their pursuit of benefits.

Moreover, many individuals do not apply for disability benefits for a considerable period of time after they have stopped working. Some may be unaware of the programs, while others may spend down their assets prior to applying. Still others hold off applying for benefits because they are hoping for medical improvement.[24/] Therefore, by the time many apply for benefits, their financial situations may be quite dire.

Needing some income to survive, applicants may try to return to work while awaiting disability benefits, even though they may endure extreme pain or further aggravate their disabilities.[25/] Disabled applicants should not be denied

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[23/] *Disability Decision Making, supra*, at 70; *Charting the Future, supra*, at 3-4.

[24/] Thus, for example, in the five cases in which the circuit courts have agreed that an individual is eligible for a trial work period before the expiration of 12 months without SGA, each applicant had waited between four and eight months after ceasing work to apply for disability benefits. Mr. Walton was terminated from his employment as an in-school suspension teacher on October 31, 1994, and he applied for benefits on April 12, 1995. In *Salamalekis v. Comm'r of Soc. Sec.*, 221 F.3d 828 (6th Cir. 2000), the claimant stopped working on approximately April 24, 1991 and applied for benefits on October 1, 1991. In *Newton v. Chater*, 92 F.3d 688 (8th Cir. 1996), the claimant applied on April 22, 1993, alleging an onset date of October 30, 1992. In *Walker v. Sec'y Health and Human Servs.*, 943 F.2d 1257 (10th Cir. 1991), Mr. Walker applied for benefits on October 2, 1987, alleging disability since February 1987. In *McDonald v. Bowen*, 818 F.2d 559 (7th Cir. 1986), Ms. McDonald stopped working on October 25, 1982 and applied for benefits on February 28, 1983.

[25/] *See, e.g., Walker v. Sec'y Health and Human Servs.*, 943 F.2d at 1258 (applicant returned to work "out of economic necessity"); *McDonald v.*
(continued...)

disability benefits when they have waited months for favorable decisions and attempt to work because they have no other means of survival.

IV. THE COMMISSIONER'S POSITION IS CONTRARY TO THE SOCIAL SECURITY ACT'S DISABILITY AND TRIAL WORK PERIOD PROVISIONS AND THE "UNSUCCESSFUL WORK ATTEMPT" REGULATIONS

The Social Security Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A) (2001). The Commissioner determines whether individuals are disabled by applying a five step sequential evaluation process that asks the following questions: (1) Is the individual engaging in substantial gainful activity ("SGA")?[26] (2) Does the individual have a severe impairment? (3) Does the individual have an impairment that meets or equals (i.e., is equivalent to) an impairment described in SSA's Listing of Impairments? (4) Can the individual, despite any functional limitations imposed by a severe impairment, perform work that he or she did in the past? (5) Can the individual do any other type of work?[27]

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[25](...continued)
Bowen, 818 F.2d at 560 (applicant returned to work "because she needed the income" and as a result suffered back pain).

[26] Beginning January 2002, earnings at or above $780 per month will be considered SGA for persons with disabilities other than blindness. 66 Fed. Reg. 54047 (Oct. 25, 2001). For blind individuals, the level is higher. *See* 20 C.F.R. § 404.1574(b) (2001).

[27] *Disability Decision Making, supra*, at 95-98. This five step process applies to adult applicants. 20 C.F.R. § 416.924 (2001).

The Commissioner concedes that "[a]s a matter of grammar, the court of appeals [for the Fourth Circuit] is correct that the phrase 'which has lasted or can be expected to last' in Section 423(d)(1)(A) modifies the word 'impairment.'" (Petitioner's Brief at 30.) Further, the Commissioner acknowledges that the statute contains no explicit requirement that the inability to engage in SGA must last 12 months. (*Id.*)

The Commissioner contends that because the Act does not contain a duration requirement for the inability to engage in SGA, the agency is free to interpret the statute to require a duration requirement of 12 months. She argues that this interpretation is consistent with the requirement in the Act that the impairment be severe. (Petitioner's Brief at 30-32.) She suggests that without the 12 month duration requirement for the inability to engage in SGA, benefits would have to be paid for short term disabilities that do not meet the severity requirements of the Act. (*Id.* at 40.)

The essential fallacy of the Commissioner's position is that it ignores the fact that an individual may have an impairment *of disabling severity* for the statutorily mandated 12 months, yet attempt to return to work within 12 months. There is no dispute that if the impairment is (or is expected to be) of *less than* disabling level severity for 12 months, then the applicant cannot qualify for benefits.

The Commissioner's position punishes the individual with an impairment of disabling severity which continues at that level of severity for at least 12 months, but who nevertheless attempts to return to work. The Social Security Act makes clear that the individual is encouraged to "test the waters" without fear that by doing so he or she will be denied basic income maintenance. In discussing trial work periods in the government's brief to the Court in *Cleveland v. Policy Mgmt. Sys.*, 526 U.S. 795 (1999), the Solicitor General (and the General Counsel for the Social Security Administration) proclaimed, "Congress recognized that persons who legitimately apply for and receive Social Security benefits may nevertheless be or become able to work." (Brief for the United

States at 15, *Cleveland v. Policy Mgmt. Sys.* 526 U.S. 795, No. 97-1008 (1999)).

Here, the Commissioner argues, contrary to the unanimous view of five circuit courts of appeal,[28] that such a trial work period can only commence not, as stated in the statute "with the month in which (the claimant) becomes entitled to disability insurance benefits," but rather after the claimant has ceased working for twelve months and thus been entitled to SSDI benefits for seven months. The additional seven months of waiting is not set forth in the statutory provision creating trial work periods. *See* 42 U.S.C. § 422(c)(3) (2001).

Since there is no dispute that the plain meaning of the statute is clear, *i.e.* the 12 month durational requirement applies to the impairment and not to work activity, it is improper for the Commissioner to interpret the statute in a manner inconsistent with the plain meaning of the statute. The durational requirement in the definition of disability "is sensibly read 'narrowly'" and may not be expanded by the Commissioner in a manner inconsistent with the Congressional goals underlying trial work periods.[29] *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 (1995)(*quoting Commissioner v. Clark*, 489 U.S. 726, 739 (1989)).

The Commissioner concedes in a footnote that under her "unsuccessful work attempt" regulations, if the claimant's work attempt lasts 6 months or less, then it will not prevent the

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[28] In addition to the holding by the Fourth Circuit in the instant case, this is the unanimous judgment of all circuits that have addressed the issue, listed *supra* at n.24. The Commissioner acquiesced in all of these other decisions. 65 Fed. Reg. 42774 (July 11, 2000); 65 Fed. Reg. 69116 (Nov. 15, 2000).

[29] For a discussion of the rehabilitative goals of the work incentives in the Social Security Act, *see infra* at Section V.

claimant from being entitled to disability benefits.[30] (Petitioner's Brief at 27, n.8.) Frequently, an individual, despite disabling impairments, attempts to return to work within 12 months, earns at a rate of pay which would constitute SGA for a month or more, but is unsuccessful in maintaining that employment. Under the Commissioner's theory of this case, such a person would not be eligible for either SSDI or SSI if the case came up for adjudication during the brief work attempt; the claimant would automatically be denied at step one of the sequential analysis of disability.

An example will illustrate the inherent difficulty with the Commissioner's position. Assume that an individual has diabetes with progressive neuropathy in both lower extremities, seriously impairing her ability to stand and walk, despite compliance with prescribed diet and medication. In January 2000, she stopped work, due to her medical condition, and filed "concurrent" claims for SSDI and SSI benefits. Her applications for benefits were denied initially and on reconsideration. She promptly appealed each denial of her benefits. She was off work January through November 2000. However, she went back to work in December 2000 and earned $1,000 in that month. She was still working and earning at the same rate in early January 2001 when the case came up for a determination of disability at an ALJ hearing. Under the Commissioner's position, she *must* be adjudicated not disabled because she earned at a level of SGA within 12 months of onset even if the ALJ would find that her condition meets a Listing.[31] The Commissioner posits that, although she clearly has had an

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[30] More specifically, the Commissioner's regulations provide that work of three months or less will be deemed an "unsuccessful work attempt" ("UWA") if it ended or was reduced below the level of SGA because of an impairment or the removal of special accommodations. If the work lasted between three and six months, it may be an UWA if any one of a number of factors was present, such as excessive absenteeism because of the impairment. 20 C.F.R. §§ 404.1574(c), 404.1575(d), 416.974(c), 416.975(d) (2001).

[31] 20 C.F.R. pt. 404, subpt. P, app. 1 at § 9.08A (2001).

impairment of disabling severity for the requisite 12 months, she was not out of work for the requisite 12 months, and hence she is entitled to nothing. Presumably, if she stops working in the future, she must start the 12 month clock running again to become eligible for benefits. This is the essence of the Commissioner's position.

However, the Commissioner acknowledges, as she must, that this work might ultimately constitute an "unsuccessful work attempt." (Petitioner's Brief at 27, n.8.) Not surprisingly, persons with disabling impairments who attempt to return to work often fail within a relatively short period of time. Even though they may earn enough money in a month that it would constitute SGA, such SGA is not counted if the work was so short that it constituted an "unsuccessful work attempt." 20 C.F.R. §§ 404.1574(c), 404.1575(d), 416.974(c), 416.975(d) (2001). In that event, the work will be disregarded and will not interrupt a period of disability. Under the rules, a work attempt of three months or less will be deemed unsuccessful if the person was compelled to stop because of her disability, and a work attempt between three and six months may also be deemed unsuccessful.[32]

Significantly, to be eligible for an unsuccessful work attempt, the disabled person must have had "a significant break in the continuity of [his or her] work before [SSA] will consider that [the person] began a work attempt that later proved unsuccessful." 20 C.F.R. §§ 404.1574(c)(2), 404.1575(d)(2), 416.974(c)(2), 416.975(d)(2) (2001). However, the Commissioner's regulations do not require that the "significant break" be for 12 continuous months. Instead, the regulations only require that the disabled individual have discontinued work for at least 30 consecutive days. *Id.*

Thus, if the disabled claimant in the above hypothetical example were forced by her impairments to stop work in January 2001, even if she made over the SGA minimum that month, her work attempt would have been "unsuccessful" and

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[32] *See* n.30, *supra*.

the SGA in Dec. 2000 and Jan. 2001 would be disregarded. If her case had come up for adjudication in February 2001, rather than January 2001, the Commissioner concedes that she would have to be found disabled although she *did* return to work in less than 12 months.

The only way to avoid the capriciousness of this result is to follow the literal statutory definition of disability which the Commissioner concedes grammatically requires the disabling impairment (rather than the period of not working) to last or be expected to last 12 months. The Court of Appeals for the Fourth Circuit correctly decided in this case that the statute provides benefits for applicants with severe disabilities of 12 months' duration. *See City of Edmonds v. Oxford House Inc,* 514 U.S. at 732.

V. THE COMMISSIONER'S INTERPRETATION OF THE SOCIAL SECURITY ACT IS INCONSISTENT WITH THE REHABILITATIVE GOAL OF THE ACT AND RELATED LEGISLATION TO PROVIDE INCENTIVES FOR INDIVIDUALS WITH DISABILITIES TO WORK

Congress has repeatedly recognized not only that persons with disabling impairments can and do work, but that they should be encouraged to do so and should not be penalized. Without attempting to be exhaustive, this federal policy is demonstrated in a number of statutes including various provisions in the Social Security Act.[33] For example, in the Economic Opportunities for Disabled Americans Act, Pub. L. 99-643, Congress amended the Social Security Act to provide various incentives for persons who receive disability benefits to attempt to work.

Congress revisited this issue in 1999 in the Ticket to Work and Work Incentives Improvement Act, Pub. L. 106-170. The goal of the legislation was to "help individuals with disabilities go to work," by removing some of the work disincentives in the

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[33] For additional citations, *see* Respondent's Brief, §§ I(B) and II(B).

SSDI and SSI programs, S. Rep. No. 106-37, at 2 (1999), and creating new work incentives as well. The law provides extended Medicare and Medicaid benefits for persons receiving SSDI and SSI respectively who attempt to rejoin the workforce, in order to provide individuals with disabilities "with meaningful opportunities to work." H. R. Conf. Rep. No. 106-478, at 1 (1999).

In passing this legislation, Congress was critical of SSA's implementation of the provisions of the Act that were designed to encourage individuals with disabilities to return to work:

> Policymakers and advocates for the disabled have long argued that SSA's work incentives are complex, difficult to understand, and poorly implemented. They contend that some of the reasons for the high rate of unemployment among disabled beneficiaries include confusing rules, arcane procedures, and disincentives built into the Social Security and SSI programs. They note surveys that show that most people with disabilities who are of working age want to work, and maintain that the numerous Federal regulations and program rules have the perverse effect of discouraging otherwise qualified and eager job seekers with disabilities from seeking employment.

H. R. Rep. No. 106-220, at 5 (1999). Congress stated that among the "obstacles" faced by individuals with disabilities who attempt to work are the "protracted application process" and the fear of losing benefits "if their work attempts were unsuccessful." H. R. Rep. No. 106-393, at 38 (1999).

The Commissioner argues that the applicant's ability to engage in SGA is "evidence" that the individual is not disabled. (Petitioner's Brief at 49.) However, this is not necessarily true. As noted *supra* at 13-14, work activity which constitutes either a trial work period or an unsuccessful work attempt is not evidence of nondisability. Similarly, this attitude was exactly what Congress disapproved of in the Ticket to Work legislation. Congress mandated that for individuals using a "Ticket to Work," "no work activity engaged in by the

individual may be used as evidence that the individual is no longer disabled." H. R. Conf. Rep. No. 106-478, at 23 (1999).

In finding that the purpose of the Americans with Disabilities Act of 1990, Pub. L. 101-336, of encouraging persons with disabilities to work, is not inconsistent with those same persons being able to obtain SSDI or SSI, the Court unanimously recognized that:

> Further, the SSA sometimes grants SSDI benefits to individuals who not only can work, but are working. For example, to facilitate a disabled person's reentry into the workforce, the SSA authorizes a 9-month trial-work period during which SSDI recipients may receive full benefits. See 42 U.S.C. §§ 422(c), 423(e)(1); 20 CFR § 404.1592 (1998).

Cleveland v. Policy Mgmt. Sys., 526 U.S. at 805. The Court should reject the Commissioner's position in the instant matter, because it is contrary to the will of Congress as repeatedly expressed in the Social Security Act and other related legislation.

CONCLUSION

For the reasons stated, *amici* urge the Court to affirm the decision below.

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APPENDIX

INTERESTS OF *AMICI CURIAE*

AARP is a nonprofit membership organization of over 35 million persons age fifty and older dedicated to addressing the needs and interests of older Americans. Over 2.8 million people between the ages of fifty and sixty-five receive Social Security Disability Insurance benefits. Approximately 1.25 million older Americans receive Supplemental Security Income as disabled individuals. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for individuals of all ages. AARP has filed numerous briefs before this Court in cases involving people with disabilities, including *Sims v. Apfel,* 530 U.S. 103 (2000) and *Cleveland v. Policy Management Systems Corp*, 526 U.S. 795 (1999).

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a non-profit corporation. While most NOSSCR members are attorneys in private practice, others work in programs which provide free legal services to the poor. NOSSCR members regularly represent people claiming benefits (usually, but not always, disability benefits) in administrative proceedings before the Social Security Administrative (SSA). NOSSCR members also file actions in federal court against the Commissioner of SSA (currently JoAnne B. Barnhart), appealing the final administrative denial of clients' claims for such benefits. These disability benefits have been provided by the Congress through two separate but interrelated programs: Social Security Disability Insurance benefits (SSDI) under Title II of the Social Security Act and Supplemental Security Income (SSI) under Title XVI of the Social Security Act. This case will have profound implications for our clients who attempt to return to work within 12 months despite having impairments of disabling severity.

The National Senior Citizens Law Center (NSCLC) is a non-profit organization which advocates nationwide to promote the independence and well-being of low income elderly individuals, as well as persons with disabilities, with a

particular emphasis on women and racial and ethnic minorities. Since its founding in 1972, NSCLC has recognized disability benefits provided under the SSDI and SSI programs as essential to the welfare of the low income elderly individuals who are the primary focus of NSCLC's efforts. In particular, NSCLC has long advocated and litigated in support of individuals who attempt to return to work, but fear the loss of disability benefits which will be essential to survival if the work attempt fails.

The American Association of People with Disabilities (AAPD) is a national membership organization working for economic and political empowerment of children and adults with disabilities. AAPD seeks to promote policies and practices that advance the goals of the Americans with Disabilities Act: full participation, independent living, economic self-sufficiency, and equality of opportunity.

The American Council of the Blind (ACB) is a national nonprofit, consumer organization of the blind, with seventy affiliates and members in all fifty states. ACB's mission is to improve the quality of life, equality of opportunity, and independence for all persons who are blind. To that end, ACB seeks to educate policy makers about the needs and capabilities of people who are blind, and to assist individuals and organizations wishing to advocate for programs and policies that meet the needs of people who are blind, or visually impaired. SSDI and SSI currently assist many people in this country who are blind or visually impaired.

The American Occupational Therapy Association (AOTA) is the national professional association of over 40,000 occupational therapists and occupational therapy assistants as well as students of the profession. The AOTA mission is to support the contributions of occupational therapy to health, well-being, productivity and quality of life. Occupational therapists provide treatment and intervention for people with physical and mental disabilities to promote full participation in society and maximum achievement of human potential. Occupational therapy can assist individuals with disabilities in identifying work limitations and potential. AOTA advocates on behalf of the profession and the public through support of

positive public policy such as that contained in the Americans with Disabilities Act and disability income support programs.

The Arc of the United States (The Arc), through its nearly 1,000 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and related developmental disabilities, and their families. Since its inception, The Arc has participated actively in the formulation of public policy with respect to the rights of, and services, supports, and benefits for, people with mental retardation and related developmental disabilities. The Arc has participated as *amicus curiae* in numerous cases before this Court that involve the rights of people with disabilities.

The Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Center has engaged in litigation, administrative advocacy, and public education to promote opportunities for individuals with mental disabilities to achieve independence and self-determination.

Founded in 1980, the Brain Injury Association of America is the nation's only nonprofit working for people with brain injury and their families. With more than 40 Chartered State Affiliates, hundreds of local chapters and support groups across the nation, the Association's mission is to create a better future through brain injury prevention, research, education and advocacy.

The Disability Law Center is the authorized Protection and Advocacy agency for the Commonwealth of Massachusetts. The Disability Benefits Project Support Unit, housed at the Law Center, provides technical support and training to public and private advocates representing Social Security claimants. Since 1985, work issues of concern to Social Security claimants and recipients have been a priority. Most direct representation provided by Project staff involves return to work issues.

The Epilepsy Foundation® is the sole national, charitable voluntary health organization dedicated to advancing the

interests of the more than two million people with epilepsy and seizure disorders. Epilepsy is a chronic brain disorder characterized by recurring seizures. Despite advances in medical knowledge and technology, many people with epilepsy are unable to engage in gainful employment or participate in many routine daily activities, and therefore incur significant medical costs as a result of having epilepsy. For these people, access to Social Security benefits is crucial to their very survival. The Foundation has, from its inception, advocated in the legislature and in the courts to ensure that this access is protected.

Headquartered in Sands Point, NY, the Helen Keller National Center for Deaf-Blind Youths and Adults (HKNC) provides short term comprehensive vocational rehabilitation training and assistance to students for job and residential placements. Services in the field include 10 regional offices, some 43 affiliated agencies, a National Training Team, Older Adult Program, the National Technical Assistance Consortium for Children and Young Adults Who Are Deaf-Blind Project, and D-B LINK. HKNC's role is to ensure that people who are deaf-blind receive the skills training and supports necessary to enable them to live and work in the community of their choice.

The National Association of Developmental Disabilities Councils (NADDC) is a national, non-profit organization representing State Councils on Developmental Disabilities that work for change on behalf of people with developmental disabilities and their families. It promotes national policy to enhance the quality of life for all people with developmental disabilities, enabling them to exercise self-determination and be independent, productive, integrated and included in all facets of community life. For many people with developmental disabilities, access to SSDI and SSI is critical for meeting their basic needs. NADDC is committed to ensuring proper access to these benefits.

The National Multiple Sclerosis Society is dedicated to ending the devastating effects of multiple sclerosis. The National MS Society is the only national voluntary MS organization that meets the standards of all major agencies that

rate nonprofit groups. The Society supports more MS research and serves more people with MS than any national voluntary MS organization in the world. Through its 50-state network of chapters, the Society funds research, furthers education, advocates for people with disabilities, and provides a variety of empowering programs for the third of a million Americans who have MS and their families.

The Title II Community AIDS National Network (TIICANN) is a national nonprofit organization, which represents the interests of those disabled and other HIV-positive persons served by state AIDS Drug Assistance and other programs funded under Title II of the Ryan White Act. TIICANN provides advocacy, training, and policy/legislative support for better drug and other health care access and strengthened disability benefits protections for disabled and other HIV-positive Americans.

United Cerebral Palsy Associations (UCP) represents over 100 affiliates in 43 states. The mission of UCP is to advance the independence, productivity and full citizenship of people with cerebral palsy and other disabilities.